Supreme Court, U.S.
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90-550
No. ——— "

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

THE EAST ASIATIC CO., INC., and
THE EAST ASIATIC CO., LTD.,
*Petitioners,*

v.

RSR CORPORATION, QUEMETCO, INC., and
QUEMETCO REALTY, INC.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF WASHINGTON COURT OF APPEALS, DIVISION ONE

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## QUESTION PRESENTED

Under the Due Process Clause of the Fourteenth Amendment, may the Washington courts simply ignore a clear statement on the face of a verdict form that the amount awarded includes a $6,498,000 award of punitive damages, when any punitive award would be unlawful and the jury was correctly instructed to award only compensatory damages?

## LIST OF PARTIES

The defendants/appellants to the proceeding in the State of Washington Court of Appeals, Division One were:

a) The East Asiatic Company, Ltd., a publicly held Danish company with worldwide trading activities; and

b) The East Asiatic Company, Inc., a wholly owned subsidiary of EAC, Ltd.*

Both EAC, Inc., and EAC, Ltd., are petitioners. In addition to EAC, Inc., EAC, Ltd. wholly owns many other companies around the world. Its partially owned subsidiaries are lisited below.** EAC, Ltd. has no parent company.

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* Paul Bergsoe & Sons, A/S ("PBS") was also initially an appellant below, but while the appeal was pending, the judgment against PBS was vacated and all claims against PBS were dismissed with prejudice. PBS, therefore, ceased to be a party.

** Norpol Pacific Marine, Inc., Nassau, Bahama; EAC Lines Trans Pacific Service Limited, Nassau, Bahama; Forest Product Carriers (International) Ltd., George Town, Cayman Islands; Landucci Industries Ltd., Surrey, B.C., Canada; Empacadora Ecuatoriano Danesa (Ecuadasa) S.A., Guayaquil, Ecuador; Industria Envasadora Nacional C.Z., Caracas, Venezuela; Inmobiliaria Titicaca C.A., Caracas, Venezuela; BeraCorporation A/S, Copenhagen, Denmark; DS-CasChem Industries Ltd., ApS, Copenhagen, Denmark; Denerco K/S, Copenhagen, Denmark; Danop I/S, Horsholm, Denmark; EAC-WBT A/S, Copenhagen, Denmark; EAC-WB Travel K/S, Copenhagen, Denmark; Frega Vermögensverwaltungsgesellschaft m.b.H., Frankfurt, Germany; ISA Internationale Schiffahrts-Agentur G.m.b.H., Hamburg, Germany; Skandinavia Haus G.m.b.H., Hamburg, Germany; VLA Vereinigte Linien-Agenturen G.m.b.H. & Co., K.G., Hamburg, Germany; SIAMAR S.r.l., Genoa, Italy; Tedeschi & Capanna S.r.l., Livorno, Italy; SEA Shipping and Chartering Company Limited, St. Helier, Jersey; Cornelder's Scheepvaart Maatschappij B.V., Rotterdam, The Netherlands; SanDutch B.V., Rotterdam, The Netherlands; Houtopslag Maatschappij Vlissingen B.V., Vlissingen, The Netherlands; EAC-PNSL Service Ltd., Croydon, United Kingdom; Beaufort Shipping Agency (WA) Pty. Ltd., Fremantle, Australia; EAC-HIL Australia Service Ltd.,

The plaintiffs/appellees to the proceeding below were:

a) RSR Corporation, a secondary (or recycled) lead producer in the United States and two of its subsidiaries;

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Croydon, United Kingdom; Global Equipment Management Limited, London, United Kingdom; GEM Container Services Ltd., London, United Kingdom; Carlsberg Brewery Hong Kong Limited, Hong Kong; The East Asiatic Company (Hong Kong) Holdings Ltd., Hong Kong; Metro Marine Services Limited, Hong Kong; Metro Terminal (HK) Limited, Hong Kong; Pro Finance (Asia) Ltd., Hong Kong; AMJ Campbell International Movers, Mississauge, Ontario, Canada; Santa Fe Transport (Canada) Limited, Vancouver, B.C., Canada; CNOJSC Santa Fe International Transportation & Services Company, Guangzhou, The People's Republic of China; Sino Santa Fe International Services Corporation, Beijing, The People's Republic of China; Beijing Dongzhimen International Apartment Company Ltd., Beijing, The People's Republic of China; ScanDutch Limited, Hong Kong; Printing Machine Trading Co. Ltd., Tokyo, Japan; The East Asiatic Company (Malaysia) Berhad, Kuala Lumpur, Malaysia; Carlsberg Brewery Malaysia Berhad, Kuala Lumpur, Malaysia; EAC Horticulture (Malaysia) Sdn. Bhd., Kuala Lumpur, Malaysia; Nedlloyd-EAC Agencies (Malaysia) Sdn. Bhd., Port Kelang, Malaysia; EAC Services Inc., Manila, Philippines; Luzon Mahogany Corporation, Manila, Philippines; Philippine Moulded Pulp Products Inc., Manila, Philippines; Bakke-Sime Darby Shipping Pte. Ltd., Singapore; Carlsberg Marketing (Singapore) Pte. Ltd., Singapore; Pacifica Ship Management (Singapore) Pte. Ltd., Singapore; Nedlloyd-EAC Agencies Pte. Ltd., Singapore; Holland International (Singapore) Pte. Ltd., Singapore; Pioner Barging (S) Pte. Ltd., Singapore; Dumex Limited, Bankok, Thailand; EAC Export Corporation (Thailand) Limited, Bangkok, Thailand; EAC Properties (Thailand) Limited, Bangkok, Thailand; The East Asiatic Company (Thailand) Ltd., Bangkok, Thailand; ICI Asiatic (Agriculture) Co. Ltd., Bangkok, Thailand; ICI Asiatic Chemical Co. (Thailand) Ltd., Bangkok, Thailand; ICI Paints (Thailand) Ltd., Bangkok, Thailand; SKF (Thailand) Ltd., Bangkok, Thailand; Thai-Dan Corporation Limited, Bangkok, Thailand; The East Asiatic Company (Brokers) Ltd., Bangkok, Thailand; The East Asiatic Company (Transport) Ltd., Bangkok, Thailand; United Asiatic Company Limited, Bangkok, Thailand; Deville Dumping and Cont. Pty. Ltd., Melbourne, Australia; Deville (N.S.W.) Pty. Ltd., New South Wales, Australia; Greenfields

b) Quemetco, Inc., a secondary lead producer; and

c) Quemetco, Realty, Inc. (collectively "RSR").

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Woolscour Pty. Ltd., Melbourne, Australia; Ferrier Woolscours (Auckland) Ltd., Auckland, New Zealand; Ferrier Woolscours (Southland) Ltd., Invercargill, New Zealand; Scanservice Leasing Company (Vanuatu) Limited, Vanuatu; Old East Graphics (Kenya) Ltd., Nairobi, Kenya; R.T. Briscoe (Nigeria) Ltd., Matori, Oshodi, Lagos, Nigeria; Integrated Vegetable Oils and Products Limited, Badagry, Nigeria; The East Asiatic Company (Pvt.) Ltd., Harare, Zimbabwe.

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IN THE

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QUEMETCO REALTY, INC.,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF WASHINGTON COURT OF APPEALS, DIVISION ONE

---

The petitioners The East Asiatic Company, Inc., and The East Asiatic Company, Ltd. (collectively "EAC"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the State of Washington Court of Appeals, Division One, entered in the above-entitled proceeding on March 5, 1990.

## OPINIONS BELOW

The opinion of the State of Washington Court of Appeals, Division One, is unpublished. It is reprinted in the Appendix at 1a-27a. By an order dated April 13, 1990, the Court of Appeals amended its opinion. The amendment is reprinted at 28a-29a of the Appendix.

## JURISDICTION

Petitioner EAC invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

The Court of Appeals entered a judgment and order affirming the judgment of the King County Superior Court on March 5, 1990. App. 1a-27a. On April 13, 1990, the Court of Appeals entered an order denying EAC's timely filed motion for reconsideration. App. 28a-29a. EAC then sought review by the Supreme Court of Washington, which denied EAC's timely filed petition for review on July 2, 1990. App. 30a.

## CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, Section 1, To The United States Constitution provides in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

RSR, the plaintiff below, was under an FTC order to divest itself of two of its lead smelter facilities. This case concerns the allegedly fraudulent inducement of the sale of one of the lead smelting facilities to Bergsoe Metal Corporation, and the alleged breach of that contract of sale by shutting the smelter down. In the first phase of a bifurcated trial, RSR, the seller/plaintiff below and respondent here, established liability against EAC on a theory of piercing the corporate veil of Bergsoe Metal Corporation. The second phase of the trial concerned compensatory damages. Earlier in the proceedings, the Superior Court had correctly rejected RSR's request for punitive damages; punitive damages are unlawful in the

State of Washington except as provided by statute and were also unavailable under foreign law.

On August 20, 1987, the jury returned a general verdict form on which it had included its calculations of the amount it was awarding, including on its face the unambiguous recital that the total verdict amount included an award of $6,498,000 as "3 years penalty for fraud." App. 42a. The trial court and counsel for both EAC and RSR all recognized that the verdict included a substantial penalty and that such a punitive award was impermissible under controlling law. App. 65a-86a. The trial court, however, had dismissed the jury before counsel saw the verdict form.

EAC immediately moved for a mistrial. App. 65a. The trial court responded at the request of RSR by reassembling the jury and instructing the reconstituted jury that its verdict could not include a penalty or punitive damages. The new instruction stated: "A penalty is a punishment and is a form of punitive damages, and may not be imposed as any part of your verdict." App. 86a. The next day, the jury returned a second verdict that was over $3,000,000 less than its first award. App. 41a. The Superior Court entered judgment on this second award, but later struck the judgment and entered a new judgment based on the jury's original penalty verdict. App. 33a-35a.[1]

Thus, the judgment finally entered against EAC in this case expressly contains a punitive award. The jury rendered the penalty verdict in its sole, unbridled discretion and contrary to instructions given to it.

EAC filed a timely notice of appeal, arguing in its opening brief on appeal that justice and due process in

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[1] Apparently, the court belatedly realized that the second verdict was a nullity because the previously dismissed jury had no power to render that verdict. App. 53a-54a. Additionally, the trial court denied EAC's various post-trial motions, including a motion for a new trial. App. 31a-32a, 48a-61a.

these circumstances cannot be served except by a new trial. EAC reiterated its Fourteenth Amendment due process argument in its reply brief. The Court of Appeals affirmed the judgment of the Superior Court, however, in an opinion that makes no mention whatsoever of due process or the Fourteenth Amendment, but simply holds that the jury's statement on the face of its verdict indicating it was including a "penalty" would be ignored. *See* App. 25a-27a. In its motion for reconsideration to the Court of Appeals, EAC again urged the court to consider the federal constitutional dimensions of the Superior Court's error in allowing the penalty verdict to stand. The Court of Appeals denied the motion for reconsideration. App. 28a-29a.

Subsequently, EAC filed a petition for review in the Supreme Court of Washington, once again arguing that the imposition of an illegal penalty verdict against EAC violated its due process rights under the Fourteenth Amendment. The Supreme Court denied the petition for review on July 2, 1990. App. 30a.

## REASONS FOR GRANTING THE WRIT

### I. BY UPHOLDING THE JURY'S "PENALTY" VERDICT, THE COURTS BELOW HAVE VIOLATED EAC'S FOURTEENTH AMENDMENT RIGHT TO REMAIN FREE FROM SUBSTANTIAL ARBITRARY IMPOSITIONS.

EAC has been stripped of its constitutional right to regular proceedings in a fair trial.[2] Even though a jury illegally awarded punitive damages in excess of six million dollars against EAC, the Washington courts have refused to recognize and correct the illegal verdict.

The due process clause of the Fourteenth Amendment guarantees all persons "'freedom from all substantial arbitrary impositions. . .'" *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502 (1977) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). That protection from arbitrary action is indisputably "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968).

These fundamental principles place constitutional limits on the power of a civil jury. For its actions to retain constitutional validity, a jury *must* decide within the limits established by the applicable legal rules and the evidence at trial. *Cf. United States v. Battiste*, 24 F. Cas. 1042, 1043 (No. 14,545) (C.C.D. Mass.) (Story, J.) (all persons possess the "right to be tried according to the law of the land, and not by the law as a jury may understand it, or choose, from wantonness or ignorance or accidental mistake, to interpret it"). Due process for-

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[2] As a Danish corporation, East Asiatic Company, Ltd., is entitled to both "equitable" and "national" treatment under Article I and Article VII(1), respectively, of the Treaty of Friendship, Commerce and Navigation with Protocol, Oct. 1, 1951, United States—Denmark. 12 U.S.T. 908, T.I.S. 4797, 421 U.N.T.S. 105. East Asiatic Company, Inc., is a domestic corporation.

bids juries from pursuing their personal predilections. *Kollender v. Lawson*, 461 U.S. 352, 358 (1983); *Smith v. Guguen*, 415 U.S. 566, 575 (1974).

Similarly, the law imposes on a trial court a constitutional duty to instruct the jury as to the applicable law, to instruct the jury to apply that law to the evidence, and to ensure that, consistent with the jury's proper role, the jury's conclusions can be reconciled with the law and the evidence. As Justice Story stated:

> It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen; it is his only protection.

*Battiste*, 24 F. Cas. at 1043.

To reflect these constitutional principles, the jury is instructed on the law, and it is the trial court's *duty* to instruct the jury correctly. Moreover, the trial court has a duty to set aside a verdict when it is rendered arbitrarily. When the jury has committed "some very gross and palpable error," or has "totally mistaken the rules of law by which the damages are to be regulated," the verdict is to be set aside. *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) (quoting Justice Story); *see also Albergotti v. Equitable Life Assurance Society of the United States*, 48 F. Supp. 290, 291 (S.D. Ga. 1942). When the jury has failed in its own duty to follow the law as laid down by the court, the court must either send the jury back to correct an improper verdict, or, if the jury has been discharged, grant a new trial. *See* Wash. Rev. Code § 4.44.460 (1989) (verdict not complete unless it "is such as the court may receive"); *Gosslee v. City of Seattle*, 132 Wash. 1, 2, 231 P. 4 (1924) ("it is the duty of the judge to look after the form and the substance [of the verdict], so as to prevent a doubtful or insufficient finding from passing into the records of the court"). In other words, to fulfill the requirements of justice and due

process, the trial court and the jury must act properly in their complementary roles.[3]

In this case, both the Superior Court and the Court of Appeals failed to extend to EAC these fundamental constitutional protections. *Cf. Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring) (granting a jury in a civil punitive damages case the "wholly standardless discretion to determine the severity of punishment appears inconsistent with due process"). After the jury rendered the illegal verdict and the trial court learned that its efforts to salvage the situation with a second verdict were ineffective, the trial court simply chose to ignore the problems with the penalty verdict. Instead, due process required that it order a new trial. On appeal, the Court of Appeals also ignored the constitutional problem with the penalty verdict. This court needs to send a message to state courts that punitive damages may not be awarded under the Fourteenth Amendment unless they are *legal*.

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[3] Granting the petition in this case should in no fashion be viewed as opening to debate the legitimacy of the jury's historic role. This case does not present an instance of a jury acting to free a William Penn or a John Peter Zenger; it is an instance of a court abdicating its responsibility to prevent a jury from arbitrarily *punishing* a defendant contrary to the law. Neither does this case require an intrusion into the jury's thought processes. The issue here is not *what* the jury did, for all parties, the Superior Court, and the Court of Appeals, acknowledge that the damages award reflected a penalty. The issue, rather, is whether due process permits the defendants to suffer such a penalty under the described circumstances.

## II. JUST AS THE PUBLIC INTEREST IS SERVED BY DIRECTION FROM THIS COURT ON THE ISSUE OF WHAT STANDARDS SHOULD GUIDE THE JURY IN MAKING PUNITIVE DAMAGES AWARDS, SO DOES THE PUBLIC INTEREST REQUIRE A CLEAR PRONOUNCEMENT FROM THIS COURT THAT ILLEGAL PUNITIVE DAMAGES AWARDS VIOLATE THE DUE PROCESS CLAUSE.

Justice O'Connor is not alone in recognizing the national need for explication of the applicability of due process principles to legal punitive damages awards. Other members of the Court also have recently noted the issue. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, —— U.S. ——, 109 S. Ct. 2909, 2921, 2923 (1989); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 837 (1986).

Just this year, this Court granted certiorari in a case presenting the question whether Alabama law allowing a jury to award punitive damages without adequate standards as to the amount necessary to punish and deter, and without connection to the amount of actual harm caused, violates the due process clause. *See Pacific Mutual Life Ins. Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989), *cert. granted*, 58 U.S.L.W. 3628 (1990) (Docket No. 89-1279). In *Haslip*, unlike in this case, the jury was told it could award punitive damages, and the question is whether a jury must be given more direction in awarding such damages.

Here, a more urgent due process issue is presented by facts showing a jury awarded punitive damages against EAC: 1) *in the absence of permission to do so*; 2) without the standards urged by the petitioner in *Haslip* as necessary to protect due process rights; and 3) without EAC even having the opportunity ever to address such an issue. The courts below in this case allowed the jury to impose an *illegal* penalty without guidance and contrary to the law and instructions. If it remains true that the "touchstone" of due process is "freedom from all sub-

stantial arbitrary impositions," certainly that guarantee must preclude upholding the jury's caprice in this case in choosing to subject EAC to the standardless punishment of a $6,498,000 "penalty."

Regardless of a state's statutory scheme on punitive damages, the issue of whether an illegal punitive damages award violates the Fourteenth Amendment is important to all jurisdictions. The failure of a jury to follow existing legislative constraints is a failure in the judicial process that cannot be tolerated.

Because similar national concerns are raised in this petition to those presented in *Haslip*,[4] this Court should grant a writ of certiorari here and use this case and *Haslip* to guide courts in cases potentially involving punitive damages. At a minimum, this Court should grant the writ requested here and hold this matter pending a decision in *Haslip*. At that time, the disposition of *Haslip* may suggest either that this case be summarily reversed and remanded to the Washington courts, or that the case receive full review by this Court.

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[4] *See also Simpson v. Pittsburgh Corning Corporation*, 901 F.2d 277 (2d Cir. 1990), *cert. pending* (Docket No. 90-121). In *Simpson*, the petition for certiorari asks the Court to decide whether New York law, as applied by the Second Circuit, violated due process in an asbestos products case by allowing the jury to award punitive damages without adequate guidelines; whether due process required that entitlement to punitive damages be demonstrated by clear and convincing evidence; and whether multiple punitive damages for the same conduct constituted a violation of substantive due process in the absence of a principle of limitation.

## CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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# APPENDIX

**APPENDIX**

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

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Nos. 21019-0-1
21024-6-1
21134-0-1
21138-2-1
23011-5-1
23064-6-1

Division One

RSR CORPORATION, QUEMETCO, INC., and QUEMETCO REALTY, INC.,
*Respondents*,

v.

BERGSOE METAL CORPORATION,
*Defendant*,

PAUL BERGSOE & SONS A/S;
THE EAST ASIATIC CO., INC.,
THE EAST ASIATIC CO., LTD.,
*Appellants*.

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OPINION

[Filed Mar. 5, 1990]

WEBSTER, J.—East Asiatic Company appeals a $19 million jury verdict and judgment entered in favor of RSR Corporation following a 7-week trial. The dispute concerns RSR's sale of a lead recycling facility to Bergsoe Metal Corporation (BMC) in 1983. East Asiatic argues on appeal: (1) that the liability verdict is not

supported by substantial evidence, (2) that the trial court improperly instructed the jury, (3) that the trial court improperly admitted testimony, and (4) that the jury's damage award is invalid. We affirm.

## FACTS

### *1. The Conception and Birth of BMC*

East Asiatic and Paul Bergsoe and Sons (PBS), Danish corporations, entered a joint venture agreement on May 24, 1965. They agreed to jointly set up and operate overseas metallurgical companies and split the liabilities and profits. The agreement required PBS to supply technical "know-how" [1] and East Asiatic to supply administrative know-how.

By approximately 1978 or 1979, the two corporations formed BMC. BMC was originally created to build and operate a lead recycling facility in St. Helens, Oregon. PBS handled technical matters relating to BMC's metallurgical operation, and East Asiatic managed the business. The Danish corporations invested $4 million each in BMC.

East Asiatic structured its management with five departments headquartered in Copenhagen. One of the departments, the industrial department, oversaw the management of East Asiatic subsidiaries. Otto Andreasen headed the department, and B.K. Kierkegaard, J.A. Jensen, and others worked below him.

BMC had five directors at its inception, of which East Asiatic was entitled to nominate two. It chose to appoint members of its high-level management: the president of East Asiatic, S. Gonge, and Andreasen. PBS nominated two directors as well: Svend Bergsoe, chairman of PBS,

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[1] Many of the documents in this case are written in Danish with English translation. The term "know-how" appears in the original and was not changed in translation.

and Preben Klehn, CEO of PBS. A friend of Svend Bergsoe filled the fifth director position.

In late 1981 Gonge offered Nils Peter Jensen, a long-time employee of East Asiatic, a position as president and treasurer of BMC. Jensen accepted the position and hired one of his former management associates from East Asiatic, Byarne Thomsen.

East Asiatic moved some of its employees to subsidiary companies in other parts of the world using a practice known in the company as "seconding". To second, East Asiatic relocated the employee to a subsidiary but retained the employee in a corporate pension fund and continued to evaluate the employee. East Asiatic seconded employees to subsidiary companies with which East Asiatic had a management contract. Once seconded, the employee had the option to return to East Asiatic if the new job was unsatisfactory. J. A. Jensen, employed in East Asiatic's industrial department, testified that East Asiatic had the right to terminate its seconded employees. (RP 1110).

East Asiatic seconded both Nils Jensen and Byarne Thomsen to work at BMC. Nils Jensen testified that he reported to PBS and East Asiatic daily as president of BMC. (RP 2100-101).

*2. RSR and Its Run-in with the Federal Trade Commission*

RSR was the second largest lead producer in the United States in 1971 and 1972. In October of 1972, RSR acquired all of the issued and outstanding capital stock of Quemetco, the fourth largest producer of secondary (recycled) lead in the United States. Quemetco operated several refineries throughout the United States, including Seattle.

The FTC issued a complaint on April 1, 1974, charging RSR with violating section 7 of the Clayton Act.[2] The complaint alleged that RSR's acquisition of Quemetco had the effect of lessening competition substantially, or tending to create a monopoly in the United States primary and secondary lead markets. The FTC ordered RSR to divest itself of two refineries located in Dallas and Seattle. The order, dated November 13, 1981, provided that RSR's divestiture of the plants would be subject to prior approval of the FTC. The order stated, inter alia, "in the event the divestiture is not accomplished by other means, RSR must auction the plants, at no minimum price, to any acquirer or acquirers who represent that the plants will be used as lead-recycling plants." The order further provided, "such divestiture shall be accomplished absolutely and in good faith to an acquirer or acquirers approved in advance by the FTC so as to transfer the plants as operable and viable plants engaged in the production of recycled bulk lead".

*3. The Reorganization of PBS*

PBS suffered from financial problems and began bankruptcy proceedings in late 1982. East Asiatic and some labor organizations become shareholders of the reorganized PBS on March 11, 1983. East Asiatic transferred to PBS all of its shares in BMC and in return received 30 percent of PBS stock.

As part of the reorganization, East Asiatic and PBS executed a "service agreement" whereby East Asiatic agreed to assist PBS and its associated companies when requested. PBS advised BMC and other subsidiaries on April 18, 1983, that in the future local management would be responsible for the operation of the subsidiary companies. Nevertheless, on May 16, 1983, PBS re-

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[2] 15 U.S.C. § 18 prohibits mergers and acquisitions, the effect of which "may be substantially to lessen competition, or to tend to create a monopoly."

quested BMC to continue to report to East Asiatic. Nils Jensen testified on cross examination that after the PBS reorganization East Asiatic's industrial department provided management services to BMC. (RP 2230). Other East Asiatic witnesses testified that East Asiatic never assisted PBS or BMC under the service agreement.

*4. BMC's Desire to Buy the RSR Seattle Smelter*

After learning of the FTC divestiture order, BMC decided to approach RSR and the FTC with an offer to purchase RSR's smelter located on Harbor Island in Seattle. BMC's president, Nils Jensen, wrote its two shareholders, East Asiatic and PBS, concerning BMC's desire to purchase the plant on December 23, 1981. Jensen noted in the letter that, according to the Environmental Protection Agency, the Seattle smelter suffered from environmental problems. The letter also stated:

> 1. It is our only competitor in this marketing area and as such will have significant impact on our ability to obtain raw material as well as sales. Its removal from the market place will enhance our cost structure for both scrap and refined lead. The plant is currently producing between 17,000 st. and 19,000 st. of lead annually and the absence of this capacity will increase our ability to reach the targeted production rate more rapidly.
>
> 2. The Seattle plant incorporates a fair-sized fabricating plant producing lead bricks, sheets, pipes and wires, as well as solder and anodes.
>
> Based upon the above important points, we recommend that BMC explore the possibility of acquiring that company. We believe such an acquisition will enable us to crease a niche in the Pacific Northwest in the lead industry.

(Ex. 75).

BMC determined in March 1982 to submit a formal offer to purchase the Seattle plant. Again, BMC wrote

East Asiatic and PBS and communicated the details. When BMC requested authorization to tour the smelter, RSR demanded that BMC first state in writing that if it acquired the plant, it would continue the smelting and fabricating operations. BMC's attorney advised the corporation to make the written statement on April 15, 1982.

On June 2, 1982, BMC again wrote East Asiatic and PBS concerning the purchase of the smelter. The letter discussed advantages and disadvantages of the sale, alternatives, and FTC approval. The letter stated "we therefore recommend that steps be taken to initiate negotiations with RSR". (Ex. 76). The letter noted that the Seattle plant, because of its age and non-compliance with EPA regulations, may have to be closed despite the FTC requirement that the purchaser of the plant continue operations.

Nils Jensen and a BMC plant manager toured the Seattle smelter on July 28, 1982. The plant manager wrote to East Asiatic and PBS concerning his inspection of the plant. He observed that the plant was very old and environmentally unsafe and recommended that BMC should not buy the plant unless RSR assumed liability for all environmental problems.

BMC telexed East Asiatic and PBS on October 16, 1982, to update the possible purchase of the Seattle smelter. The telex indicated that although other parties interested in buying the RSR land and plants existed, the FTC would not approve them because they lacked the capability and desire to operate the facility as a lead-recycling plant. The telex also stated that unless an eligible buyer made an offer soon, RSR would request the FTC to discharge the divestiture order. BMC also stated in the telex that it feared RSR could improve the plant to meet environmental requirements and remain BMC's competitor in the lead smeltering business.

On October 21, 1982, J.A. Jensen of East Asiatic's industrial department prepared an internal memorandum discussing BMC's purchase of the RSR plant. The memo recommended that BMC should reserve the right to close the smelter if it loses money or encounters environmental problems.

That same day, East Asiatic telexed BMC and stated that it must include a reservation in the RSR purchase contract allowing BMC to close the smelter if it loses money or if required by environmental authorities. BMC immediately responded: "if RSR claims to FTC that BMC is intending to discontinue operation of part or all of plant, this could be a reason for FTC to excuse RSR from obligation to sell." (Ex. 89). The telex also stated that BMC would obtain one of RSR's customers as a result of buying the plant.

East Asiatic telexed BMC on October 22, 1982, and stated "we agree to your writing out the bid without the reservation in our telex of 21 October." (Ex. 80).

Nils Jensen wrote East Asiatic on October 27, 1982, to again suggest purchasing the Seattle smelter. He indicated that RSR was the factor which limited BMC's sales. He wrote, "should RSR lose or voluntarily give up [its] business, we could reach maximum capacity utilization within a few months." (Ex. 86).

On November 2, 1982, Andreasen telexed Nils Jensen authorizing BMC to submit a bid for the Seattle plant. He requested that BMC offer to lease the land and buildings. BMC in turn submitted to RSR an offer to lease the buildings and real property. RSR refused to forward the offer to the FTC because under the FTC order, RSR was not required to lease, but rather, to sell the plant.

On February 10, 1983, an East Asiatic employee, Kierkegaard, visited the United States and spoke with BMC and its attorney to discuss the possible acquisition of the

RSR Seattle smelter. He wrote an internal memorandum to the members of the industrial department which said that BMC's lawyer concluded that BMC's plan to shut down the Seattle smelter within 6 months of the purchase would be acceptable to the FTC. Kierkegaard stated, "this question should be examined further." (Ex. 81). In another memo, Kierkegaard suggested that East Asiatic's more experienced corporate lawyer should give an opinion on the matter. (Ex. 82). The memo further stated that acquisition of RSR would solve BMC's financial problems.

BMC's attorney wrote a memo to BMC's board of directors on February 11, 1983. The memo stated in part:

> BMC should be prepared to operate the Seattle facility for a period of time unless it makes a documented determination that to do so would be environmentally hazardous. If BMC immediately shuts down the plant, RSR could possibly file a suit for damages caused by fraud or misrepresentation.

(Ex. 177).

East Asiatic's corporate counsel prepared an opinion memo which stated in part "we do not see a problem with the FTC if the operations of the plant are terminated after its acquisition for a reasonable purpose." (Ex. 90).

J.A. Jensen of the East Asiatic industrial department wrote a memo directed to the East Asiatic executive board on February 21, 1983. The memo discussed the upcoming purchase proposal of the RSR plant. The memo stated in part that it will be necessary to continue smelting for a short period of time before the plant is closed down. The memo also called for immediate evaluation of the economic consequences of having to fire the employees of the plant after a brief period of operation. Andreasen read the memo and marked "in agreement" on it, meaning that he agreed with its content. (RP 1502).

On February 23, 1983, East Asiatic telexed BMC and stated:

> Partners authorize you to submit offer by BMC wholly owned company Seattle Lead Products Inc. (SLPI) at a price of $500,000.

(Ex. 93). The telex also stated "evaluation of financial implications of dismissal of work force after brief period of operation must be worked out immediately and forwarded." *Id.* That same day, BMC, through a wholly owned subsidiary, submitted an offer to purchase RSR's Seattle plant. On page 9, the offer stated: "The purchaser intends to and will continue to operate the plant as a lead recycling plant after closing." (Ex. 47).

RSR sent a copy of this proposal to the FTC on March 2, 1983.

A BMC attorney wrote the FTC to persuade it to approve BMC as a suitable purchaser of RSR on April 26, 1983. The letter reported the financial and ownership changes of BMC. *Id.* at 2. Specifically, the letter stated,

> Paul Bergsoe and Sons is now the sole owner of the Bergsoe Metal Corporation, St. Helens, Oregon. East Asiatic Corporation now owns 30 percent of the shares in Paul Bergsoe and Sons and has a management agreement with the Bergsoe Metal Corporation to manage and supply management personnel to the Portland, Oregon, plant. . . . Thus, Bergsoe Metal Corporation has a parent that is now adequately supplied with capital.]

(Ex. 49). In another letter to the FTC dated May 18, 1983, BMC's lawyer again provided information to the agency. The letter stated,

> PBS and [East Asiatic] have operated joint venture plants in Europe and South America similar to BMC for the last 25 years. During those years practices

> and procedures have evolved which govern day-to-day operations. Major decisions are reached after mutual consultations and sometimes formalized by an exchanged of letters. The BMC joint venture was initiated on this basis. . . . PBS is now the sole owner of BMC, and [East Asiatic] owns 30 percent of the shares of PBS.

(Ex. 95).

BMC telexed East Asiatic on June 22, 1983, to update the purchase of the RSR plant. The telex requested that PBS provide a letter to the FTC stating (1) that PBS intended to provide all necessary financing to acquire the Seattle smelter and to make it a going and viable concern, and (2) that PBS intended to operate the plant in the business of secondary lead smelting. Two days later, BMC telexed PBS and East Asiatic instructing that the letter to the FTC be sent to BMC's attorney in Washington, D.C. Andreasen handwrote on the bottom of the telex: "27 June 1983: talked to Bent Jensen on the telephone. He and I agreed to procedure that the bank must agree before the letter is released." (Ex. 119). Bent Jensen, president of PBS, wrote a letter to the FTC on June 28, 1983, stating:

> [PBS] intends to provide all the necessary financing to acquire the RSR Seattle facility and to make it a going and viable concern and to operate the plant in the business of secondary lead smelting.

(Ex. 175).

*5. BMC's Financial Trouble*

BMC's board of directors met on September 14, 1983, and determined, "there is no justification for continued operations of BMC." (Ex. 120). The minutes of the meeting indicated that this determination was "sanctioned" by the shareholders of PBS.

Andreasen testified that prior to BMC's acquisition of the RSR plant, he discussed the possibility of putting BMC into bankruptcy. (RP 1668-79).

*6. Misrepresentations Made to RSR*

RSR's president testified that he was assured by Nils Jensen that BMC would keep the plant operating. He also testified that Nils told him that BMC had the financial backing of East Asiatic to keep the plant going. (RP 3022).

East Asiatic witnesses testified that Nils Jensen had no authorization to make representations to RSR or to the FTC on behalf of East Asiatic.

*7. Closing the Deal*

On October 12, 1983, the FTC approved the sale of the Seattle smelter to BMC. The FTC made the determination to approve the deal based on information and representations made by the parties.

Nils Jensen, Byarne Thomsen, and BMC's attorney met with RSR's president in Dallas to close the transaction. RSR's president testified that Nils Jensen said that he "had to clear things and talk to East Asiatic." (RP 1360). BMC's lawyer testified that they may have said that they needed to contact Copenhagen during negotiations with RSR in Dallas. (RP 2295).

The record shows that as late as November 15, 1983, East Asiatic knew that if BMC's bank did not loan the purchase money RSR "would be in a new situation" because no other buyers for the smelter had surfaced who intended to continue operating the plant. (Ex. 85). A manager of United States National Bank of Oregon testified that BMC had planned to shut down the Seattle plant regardless of whether the environmental authorities required it to do so.

*8. Plant Shut Down*

BMC took over the RSR facility December 7, 1983. Nils Jensen sent a management report to the East Asiatic industrial department dated December 23, 1983, in which he wrote, "[i]t is interesting to note that the Seattle plant constitutes a capital investment 1/50 of that of the St. Helens plant, and that it can produce twice as much lead in a 24-hour period using half as much labor." (Ex. 97).

The smelter contained refractory bricks which periodically eroded. In January, 1984, the smelter needed to be rebricked. Rather than rebricking the furnace, BMC shut down the Seattle smelter.

RSR filed this action on November 2, 1984, against BMC, PBS, and East Asiatic alleging that the defendants acquired RSR's plant by fraudulently misrepresenting their intent to continue operating the plant.

BMC filed for bankruptcy while this action was pending. As a consequence, a bankruptcy court stayed all proceedings in this case against BMC.

PBS filed a notice of appearance in the action but did not appear at trial. RSR obtained an order of default on August 4, 1987, against PBS.

Jury voir dire in the trial against East Asiatic began the afternoon of July 6, 1987. On August 20, 1987, a jury entered a verdict in favor of RSR for $19,445,000. On a form containing the verdict, a juror wrote notes which seem to indicate that a portion of the general verdict was a penalty for fraud. Earlier in the proceedings, the court had rejected RSR's request for punitive damages following a motion for summary judgment by East Asiatic. After the court discharged the jury, a juror asked the bailiff if he thought the amount awarded was fair. The bailiff replied "yes". The court resubmitted the issue of damages to the jury with additional instruc-

tions not to consider punitive damages. The jury returned a second verdict on August 21, 1987, for $16,147,000. The court entered a judgment on the second verdict on September 11, 1987. On September 23, 1987, the court granted a motion by RSR to strike the judgment. The court entered a new judgment based on the jury's first verdict.

## SUBSTANTIAL EVIDENCE

East Asiatic argues that the court erred in denying its motions for directed verdict and for judgment n.o.v. It asserts that insufficient evidence exists to support finding East Asiatic liable for misrepresentations which induced RSR to sell the Seattle smelter.

The parties stipulated below that, pursuant to a provision of the contract to sell the RSR smelter, substantive law of New York applies to the disposition of the following issues: (1) East Asiatic's fraud inducing RSR to sell the smelter; (2) disregard of BMC corporate form so as to hold East Asiatic liable; and, (3) punitive damages. Washington law applies to procedural issues of this case. Restatement (Second) Conflict of Laws § 122 (1971).

When a party challenges the sufficiency of the evidence by way of a motion for directed verdict or a judgment notwithstanding the verdict, the court accepts the truth of the nonmoving party's evidence and draws all reasonable inferences from that evidence in favor of the nonmoving party. *Grader v. Lynnwood*, 53 Wn. App. 431, 437, 767 P.2d 952, *review den'd*, 113 Wn.2d 1001 (1989). An appellate court must determine as a matter of law that no competent evidence or inferences to be drawn in favor of the nonmoving party would sustain the jury's verdict. *Id.* "Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise." *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984).

The courts of New York have long recognized that a corporation's form may be disregarded and liability extended to its shareholders in certain instances, a principle contrary to the general rule that a corporation shields its shareholders from liability. *See e.g. Walkovszky v. Carlton*, 18 N.Y.2d 414, 276 N.Y.S.2d 585 (1966); *Berkey v. Third Avenue Ry. Co.*, 244 N.Y. 84, 155 N.E. 58 (1926). To "pierce the corporate veil" the courts developed the so-called "instrumentality rule". *Lowendahl v. Baltimore and O.R. Co.*, 247 App. Div. 144, 287 N.Y.S. 62 (1936). *Lowendahl* states:

> Except [in cases of] express agency, estoppel, or direct tort, three elements must be proved:
>
> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice *in respect to the transaction attacked* so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

(Emphasis added). 287 N.Y.S. at 76.

East Asiatic challenges the adequacy of the evidence establishing the first element, control. A particularly instructive case interpreting this element is *Worldwide Carriers, Ltd. v. Aris Steamship Co.*, 301 F. Supp. 64 (S.D.N.Y. 1968). *Worldwide* states, "[i]n determining whether the requisite degree of control is maintained by the parent corporation, many factors are relevant. It is

the presence of these factors in the proper combination which is controlling." *Id.* at 67. The factors are as follows:

> (a) The parent corporation owns all or most of the capital stock of the subsidiary.
>
> (b) The parent and subsidiary corporations have common directors or officers.
>
> (c) The parent corporation finances the subsidiary.
>
> (d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.
>
> (e) The subsidiary has grossly inadequate capital.
>
> (f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.
>
> (g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.
>
> (h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.
>
> (i) The parent corporation uses the property of the subsidiary as its own.
>
> (j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.
>
> (k) The formal legal requirements of the subsidiary are not observed. Taylor v. Standard Gas & Electric Co., supra, 96 F.2d 693 at 704-705 . . . .

*Id.* at 67-68.

Here, the record contains substantial evidence relating to many of the above factors.

(a) East Asiatic owned one-half of BMC's outstanding stock interests until late 1982. When PBS was recognized, East Asiatic became owner of 30 percent of PBS and PBS acquired East Asiatic's shares in BMC.

(b) East Asiatic nominated two of BMC's directors, both of whom were East Asiatic officers. Another officer of East Asiatic served as BMC's secretary. However, when RSR finally accepted BMC's offer, East Asiatic had only one officer serving as a director of BMC.

(c) East Asiatic financed half of BMC's initial capitalization. Evidence suggests that on March 18, 1983, East Asiatic transferred $393,625 to BMC. (RP 1542). On April 5, 1983, East Asiatic appears to have advanced $250,000 to BMC. (RP 1543). The total purchase price for the Seattle smelter was $500,000. Although East Asiatic disputed the purpose of these transfers, an inference can be made that East Asiatic helped fund the purchase of the Seattle smelter.

(d) East Asiatic and its partner PBS created BMC and each subscribed to one-half of BMC's capital stock. Significantly, East Asiatic's role in its partnership with PBS was to provide management of the business operations of subsidiaries which the two created.

(e) Evidence admitted at trial showed that East Asiatic as early as September 14, 1983, "sanctioned" the discontinuation of BMC's operations. (Ex. 120). Andreasen admitted discussing putting BMC into bankruptcy prior to RSR's acquisition. RP 1678-793. Andreasen also made statements on cross examination which raise the inference that East Asiatic tried to protect itself by instructing BMC to purchase the plant through another, subsidiary corporation of BMC. *See* RP 1679-1681. Further, a letter from Nils Jensen in October 1982 to East Asiatic described BMC's financial troubles. (Ex. 86). This

evidence raises an inference that East Asiatic undercapitalized BMC and took other steps to reduce its exposure to RSR for fraud.

(f) East Asiatic had several seconded employees working for BMC, whose pension benefits were provided by East Asiatic: in particular, Nils Jensen, BMC's president, and Bjarne Thomsen.

(g) Nothing in the record indicates that East Asiatic transacted business with BMC.

(h) East Asiatic's responsibility under the original agreement with PBS was to provide "administrative know-how" in the business operations of BMC. Substantial evidence in the form of telexes and internal memoranda suggests that East Asiatic closely monitored BMC's purchase of the RSR plant and authorized or vetoed BMC's actions. East Asiatic specifically authorized BMC to make an offer to RSR on February 23, 1983. (Ex. 93). That offer was forwarded to the FTC, approved, and thereafter accepted RSR. East Asiatic's recognition that it needed to shield itself from liabilities arising out of the transaction raises the inference that East Asiatic assumed responsibility for BMC's purchase of the smelter.

East Asiatic argues that when RSR was reorganized, East Asiatic no longer exerted any control over BMC's actions. Evidence in the record suggests otherwise. PBS specifically instructed BMC to continue reporting to East Asiatic on May 16, 1983. (Ex. 153). BMC regularly reported to East Asiatic and East Asiatic continued to give instructions to BMC well after the reorganization of PBS. Moreover, BMC was composed of several seconded employees of East Asiatic. Seconded employees had the ability to quit working for BMC and return to East Asiatic. Evidence in the record also suggests that East Asiatic regularly reviewed seconded employees and had the power to fire them as well, raising an inference that BMC was controlled by East Asiatic. (RP. 1107-1110).

(i) The only evidence in the record that East Asiatic used BMC's property as its own is that East Asiatic took an active, controlling role in the act of buying the RSR plant. Thus, in this sense, an inference can be made that East Asiatic treated BMC's assets as its own.

(j) Substantial evidence establishes that BMC's president, Nils Jensen, took orders from East Asiatic. He sent numerous telexes to Copenhagen regarding the proposed purchase of the RSR smelter. These telexes and responsive telexes received from East Asiatic strongly suggest that Nils did not act in relation to the RSR transaction without authority from East Asiatic. Importantly, BMC sought *specific* approval from East Asiatic concerning the provision in the contract which stated that BMC intended to continue operating the plant as a lead smelter. (Ex. 89). BMC continued to contact and receive instructions from East Asiatic after PBS's reorganization. *See, e.g.*, Ex. 119, 121. Finally, the evidence suggesting that East Asiatic had the power to fire seconded employees supports the inference that East Asiatic could ensure that Nils and other seconded employees followed orders from Copenhagen.

(k) Formal legal requirements of BMC appear to have been observed.

Not every factor of the *Worldwide* case is present. However, substantial evidence and inferences drawn in favor of RSR supports the jury's finding that East Asiatic exerted control over BMC with respect to the RSR transaction. The *Worldwide* case in no way suggests that all of the listed factors must be present in order to pierce the corporate veil. Notably, the RSR transaction took place over a long period of time. Although BMC's ownership changed during negotiations, East Asiatic continued to guide BMC. East Asiatic continued to receive reports, telexes, and telephone calls from BMC. The record suggests that BMC took no steps in the transaction without first contacting East Asiatic. Most importantly, substan-

tial evidence established that the decision to represent to RSR that BMC intended to continue operating the smelter was left to East Asiatic.

East Asiatic cites *D.L. Auld Co. v. Park Electrochemical Corp.*, 553 F. Supp. 804 (E.D.N.Y. 1982), to stand for the proposition that as a matter of law the evidence presented is insufficient to show that East Asiatic controlled BMC in relation to the RSR purchase. In that case, the plaintiff had sued a subsidiary and its parent for patent infringement. *Id.* at 805. The plaintiff made no claim that the corporate form was being used to perpetrate fraud. No claim was made that the parent controlled the subsidiary in the manufacture and sale of the allegedly infringing product. Instead, the plaintiff simply alleged that the parent dominated the management of the subsidiary such that the subsidiary's corporate existence should be disregarded. *Id.* at 806. Here, unlike the *Auld* case, East Asiatic directly participated in and authorized BMC to misrepresent its intent to continue operating the smelter. Evidence shows that East Asiatic was extensively involved in the decision to purchase the Seattle smelter. The evidence of control of East Asiatic over BMC focused on this particular transaction, not the business operations of BMC in general.

Thus, drawing all inferences in favor of RSR, we conclude that substantial evidence supports the jury's finding that East Asiatic controlled BMC's purchase of the Seattle smelter.

> [E]ven if [we] were convinced that a wrong verdict had been rendered, this court would not substitute its judgment for that of the jury so long as there was evidence which, if believed, would support the verdict rendered.

*Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 246, 391 P.2d 194 (1964).

East Asiatic has presented arguments attacking other aspects of the jury's liability verdict. However, because

we conclude that substantial evidence supports the jury's conclusion on the theory of corporate disregard, we need not address these issues.

## JURY INSTRUCTIONS

Several assignments of error concern instructions which the court gave to the jury. First, East Asiatic contends that the trial court erred by giving the jury an instruction on corporate disregard. Instruction 16, addressing the issue of domination and control for the purpose of piercing the corporate veil, read in part:

> To determine whether the plaintiffs have proven domination, you should consider whether any of the following factors were present at the time of the wrong issue. Mere proof of business practices common to most affiliated corporation relationships is insufficient to prove domination.
>
> No one factor is sufficient, but rather the plaintiffs must prove the presence of a "combination" of the following factors . . . .

East Asiatic excepted to the use of the word "combination" without being followed by an explanatory phrase. It provided this explanatory phrase in its proposed instruction 16:

> For example, providing the presence of complete stock ownership, common officers and directors, and the use of organization charts in the alleged dominator's papers illustrating lines of authority that run between the alleged dominator and the alleged instrumentality corporation is mere proof of business relationships common to most affiliated corporation relationships, and therefore is insufficient to prove domination.

Jury instructions must properly inform the jury of the law and allow each side to argue its theory. *Peterson v. State*, 100 Wn.2d 421, 432, 671 P.2d 230 (1983). The

instructions must be read as a whole and are sufficient if they are readily understood and not misleading to the ordinary mind. *Id.* at 440.

Instruction 16 must be read in conjunction with another instruction, number 15, which set out the general rule for corporate disregard:

> To find that Bergsoe Metal Corporation's corporate form should be disregarded, and the East Asiatic Corporation defendants should be held liable for Bergsoe Metal Corporation's alleged wrongs, you must find that Bergsoe Metal Corporation was a "mere instrumenality" of the East Asiatic Corporation defendants. The plaintiffs must prove each of the following elements to establish Bergsoe Metal Corporation was an instrumentality of the East Asiatic Corporation defendants:
>
> (1) Domination and control, not mere majority or complete stock control but complete domination, not only of finances, but of policy and business practice in respect to the transaction at issue so that the corporate entity as to this transaction had at the time no separate mind, will, or existence of its own; and
>
> (2) Such domination and control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid combination and control and breach of duty must proximately cause the injury or unjust loss complained of.

Instruction 15 is almost a direct quotation from another New York case which both parties agree is an accurate statement of the law. *See Lowendahl*, 287 N.Y.S. at 756 (1936). Moreover, the word "combination" is a term used in a case upon which East Asiatic relies. *See*

*Worldwide Carriers, Ltd. v. Aris Steamship Co.*, 301 F. Supp. at 67. We conclude that both instructions, when read together, accurately state the law of corporate disregard. We find no authority which requires the presence of a "special" combination of factors to support a finding of domination in any given case. When substantial evidence exists to support a conclusion, a question answered by a finder of fact will not be disturbed on appeal.

Moreover, the trial court properly rejected East Asiatic's proposed instruction because it was unsupported by the facts. A party is entitled to an instuction only if substantial evidence supports the proposed instruction. *Board of Regents v. Frederick & Nelson*, 90 Wn.2d 82, 86, 579 P.2d 346 (1978). The evidence presented at trial did not establish that East Asiatic had complete stock ownership of BMC. In this sense, East Asiatic's example of a "combination of factors" was not applicable to the evidence presented and was therefore properly rejected by the trial court. Thus, even assuming arguendo that a more specific instruction should have been given, the trial court did not err because East Asiatic's proposed alternative was improper. *See Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 284-85, 686 P.2d 1102 (1984).

Next, East Asiatic argues that there is no evidence in the record to support giving the jury an instruction on the law of agency, number 27. The jury's verdict specifically found (1) that BMC's corporate form should be disregarded, and (2) that East Asiatic made false representations which RSR justifiably relied upon. The latter finding was apparently based on a conclusion that East Asiatic, through an agent, made false representations to RSR. Because we have concluded that the jury was properly instructed on the theory of corporate disregard and that the jury's finding on this issue was supported by substantial evidence, any error which might have occurred in instructing the jury on agency law is harmless. *See Nelson v. Mueller* 85 Wn.2d 234, 236, 533

P.2d 383 (1975) (giving of erroneous instruction does not justify granting new trial unless appellant can show prejudice and that error affected jury's conclusion).

East Asiatic assigns error to another jury instruction which contained a clause that read: "There may be one or more proximate causes of an event." (Instruction 5). RSR claims that no evidence or assertions support this instruction. We disagree. East Asiatic itself argued as an affirmative defense that events subsequent to the sale of the lead facility relieved BMC of any obligation to operate the smelter. (Instruction 8 ¶ 7).

Finally, East Asiatic takes issue with an instruction which stated in part, "[i]t is sufficient if the fraud intended to injure the plaintiff.'" (Instruction 28). We find that the evidence supports the giving of this instruction. Several exhibits showed that both BMC and East Asiatic intended to remove RSR from the secondary lead market to improve BMC's business. *See* Exs. 75, 86.

## HEARSAY TESTIMONY

RSR's president testified, over objection, that Nils Jensen said to him during closing negotiations of the transaction that Nils could not close the purchase without "clearing things" with East Asiatic. (RP 1360). Asiatic argues that this testimony is inadmissible hearsay. We disagree.

ER 801(d)(2)(iv) provides that admissions by a speaking agent of a party opponent are exempted from hearsay treatment. "Unless the fact of the agency may be inferred from other evidence, the mere declarations of an alleged agent, made out of court, may not be used to establish the fact of his agency". *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 171, 758 P.2d 524 (1988). If prima facie proof of the agency—other than the hearsay testimony itself—is established, the testimony may be admitted to corroborate the proof. 5B K. Tegland, Wash. Prac., *Evidence* § 349 (3d ed. 1989).

An internal memorandum dated November 16, 1983, documented a phone conversation between Nils Jensen and J.A. Jensen of East Asiatic. (Ex. 85). This phone conversation concerned the RSR transaction, which closed days later, and specifically, the terms of the sale. This close contact between East Asiatic and BMC suggests that East Asiatic instructed Nils Jensen *what to say* in the deal. Further, BMC's attorney admitted, "[w]e [Nils and the attorney] may have said that we were going to call Copenhagen." (RP 2295). This raises the inference that Nils Jensen, a spokesman for BMC, also represented East Asiatic's interest in the transaction as well. We also find significant that Nils Jensen was a seconded East Asiatic employee. By his own admission, he reported to East Asiatic daily. (RP 2100). Other correspondence from East Asiatic authorizing Nils Jensen to make certain representations in the RSR negotiations provides further evidence to establish a speaking agent relationship. Specifically, East Asiatic telexed Nils Jensen, as head of BMC, and stated, "Partners authorize you to submit offer". (Ex. 93). Thus, we find sufficient evidence in the record to establish a speaking agency relationship. The testimony was properly admitted under ER 801(d)(2)(iv).

## DAMAGES

East Asiatic argues that under New York law, damages resulting from contracts induced by fraud must be limited to the difference between the sales price and the market value at the time of the fraud. East Asiatic contends that the court erred in refusing to instruct the jury as to the time at which damages should be measured.

None of the authorities cited by East Asiatic require that a different damage instruction be given. The cases submitted by East Asiatic on this issue are inapplicable either because they do not involve allegations of fraud, or because they involve fraud committed by a seller rather than a buyer. The line of cases following *Reno*

*v. Bull*, 226 N.Y. 546, 124 N.E. 144 (1919), is also inapposite. In *Reno*, the court held that in cases where the plaintiff alleges fraud in the sale of securities, damages will be limited to the difference between the amount paid and the value of the actual stock at the time of sale. 124 N.E. at 146. The court held that an action for fraud is to indemnify the facts of the present case do not involve a seller frauduently inducing a person to buy stock.

In *Cayuga Harvester, Inc. v. Allis-Chalmers Corp.*, 95 A.D.2d 5, 465 N.Y. Supp. 2d 606, 608 (1983), the court held that a farmer who relied on false representations when purchasing a combine was entitled to the value of the corn crop he would have enjoyed had he not been induced to buy a defective machine. *Id.* at 618. The court recognized that consequential damages are available in a fraud action. *Id.* RSR's evidence submitted on the issue of damages concerned the profits RSR would have enjoyed had it not sold the smelter. RSR's lost profits are consequential damages which resulted from selling its plant to BMC, which it would not have done but for the fraudulent misrepresentation. We conclude that under *Cayuga*, RSR's damages are not limited to the difference between the sales price and the market value of the RSR smelter at the time of the purchase. Thus, we reject East Asiatic's argument.

## JURY VERDICTS

A member of the jury wrote on the face of the verdict form a table of numbers, most probably for calculation purposes, and explanatory notes next to them. One of the notes read, "+3 YEARS PENALTY FOR FRAUD," located beside a number. The court's instructions to the jury stated that the jury was to determine an amount of money to fairly compensate for damages proximately caused by the defendants. No instruction told the jury to impose punitive damages. East Asiatic asserts that the verdict was rendered invalid by the notes. We disagree.

In *Roe v. Safeway Stores, Inc.*, 14 Wn.2d 363, 128 P.2d 293 (1942), a jury returned a general verdict form in favor of the appellants which contained a handwritten note. A juror had written " 'By reason of contributory negligence.' " *Id.* at 371. The court, however, had not directed the jury to find any particular question of fact, but to simply enter a general verdict. *Id.* at 370. The court analyzed the problem as follows,

> informal language injected into a general verdict by a jury may be of such a character as to render it fatally vague, ambiguous, or contradictory; but, where the intent of the jury is clearly indicated and the verdict is otherwise sufficient, the informal portions should be disregarded as surplusage. Treating gratuitous, explanatory remarks which a jury may append to its general verdict as a special finding of fact, or as a guide in determining how the jury may have resolved the factual issues, would invite surmise and conjecture and lead to uncertainty and confusion.

*Id.* at 373. Here, the notation contained on the form renders the general verdict neither vague, ambiguous, nor contradictory.

In *Kagele v. Frederick*, 43 Wn.2d 410, 416, 261 P.2d 699 (1953), the court held that notations placed on a general verdict which segregated the amount of general damages was surplusage. The court found that, notwithstanding the notes, the intent of the jury was clear. *Id.* at 416. In *Jensen v. Beaird*, 40 Wn. App. 1, 13, 696 P.2d 612 (1985), a jury improperly apportioned damages between joint tort feasors which were jointly and severally liable. The court deemed the unnecessary apportionment surplusage and disregarded it. *Id.*

Other courts have disregarded a jury's notation which segregated a damages award. In *Barrow v. Talbott*, 417 N.E.2d 917, 921 (Ind. App. 1981), a jury awarded a party $80,000 and placed an asterisk by the figure. At

the bottom of the form, the jury repeated the asterisk and wrote beside it, " '$75,000 for suffering . . . $5,000 for future medical services.' " *Id.* at 921. The appellant asserted that the evidence was insufficient to support the jury's conclusion that future medical expenses were $5,000. *Id.* The court refused to analyze the propriety of the future medical expenses award. Instead, the court held the language surplusage. The court then went on to analyze whether the $80,000 award was excessive. *Id.*

The solution when a jury provides gratuitous surplusage to a general verdict is to eliminate it from the judgment unless the additional language makes the verdict unclear or contradictory. In the absence of uncertainty, the inquiry on appeal is limited to whether the general damage award was excessive. East Asiatic has not challenged the sufficiency of the evidence in support of the $19,445,000 general verdict.

We conclude that the trial court properly ignored the notation at the bottom of the general verdict and entered a judgment based on the general verdict.

In light of our decision, we deem it unnecessary to consider RSR's cross appeal. We affirm.

/s/ Webster, J.

WE CONCUR:

/s/ Winsor, J.

/s/ Grosse, ACJ

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

---

Nos. 21019-0-1
21024-6-1
21134-0-1
21138-2-1
23011-5-1
23064-6-1

RSR CORPORATION, QUEMETCO, INC.,
and QUEMETCO REALTY, INC.,
*Respondents,*

v.

BERGSOE METAL CORPORATION,
*Defendant,*
PAUL BERGSOE & SONS A/S;
THE EAST ASIATIC CO., INC.,
THE EAST ASIATIC CO., LTD.,
*Appellants.*

---

## ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION

Appellants EAC, having filed a motion for reconsideration herein, and the court having considered the motion; Now, therefore, it is hereby

ORDERED that the motion is hereby denied except insofar as the motion requests revision of a portion of the opinion which references the agreement between EAC and Paul Bergsoe and Sons. The opinion of this court in the above-entitled case filed March 5, 1990, is hereby amended as follows:

Change the first two sentences of the first paragraph appearing on page 2 which read:

> East Asiatic and Paul Bergsoe and Sons (PBS), Danish corporations, entered a joint venture agreement on May 24, 1965. They agreed to jointly set up and operate overseas metallurgical companies and split the liabilities and profits.

to read:

> East Asiatic and Paul Bergsoe and Sons (PBS), Danish corporations, entered an agreement on May 24, 1965, to jointly set up and operate overseas metallurgical companies.

DATED this 13th day of April, 1990.

/s/ Webster, J.

/s/ Grosse, ACJ

/s/ Winsor, J.

THE SUPREME COURT OF WASHINGTON

---

No. 57209-7

RSR CORPORATION; QUEMETCO, INC.;
and QUEMETCO REALTY, INC.,
*Respondents,*

v.

BERGSOE METAL CORPORATION,
*Defendant,*

and

PAUL BERGSOE & SONS A/S;
THE EAST ASIATIC COMPANY, INC.;
and THE EAST ASIATIC COMPANY, LTD.,
*Petitioners.*

---

ORDER

This matter came before Department I of the Court on its July 2, 1990, Petition for Review Calendar on Petitioners' Petition for Review and Motion to Certify an Issue to the New York Court of Appeals. Department I having considered the motion and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petition for Review is denied. Motion to Certify an issue to the New York Court of Appeals is denied.

DATED at Olympia, Washington this 2nd day of July, 1990.

/s/ Keith M. Callow
Chief Justice

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

---

No. 84-2-16023-3

RSR CORPORATION, *et al.*,
*Plaintiffs,*

v.

BERGSOE METAL CORPORATION, *et al.*,
*Defendants.*

---

ORDER DENYING DEFENDANTS'
THE EAST ASIATIC CO., LTD.
AND THE EAST ASIATIC CO., INC.
POST-TRIAL MOTIONS

THIS MATTER having come before the Court for hearing on September 23, 1987 on Defendants' The East Asiatic Co., Ltd. and The East Asiatic Co., Inc. Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial and/or Remittitur, and the Court having considered said motions and the memorandum and other materials of defendants The East Asiatic Co., Ltd. and The East Asiatic Co., Inc. in support thereof, the materials submitted by the corporate plaintiffs in opposition thereto and the records and files herein, having heard the argument of counsel and having rendered its ruling denying the East Asiatic Companies' post-trial motions, NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' The East Asiatic Co., Ltd. and The East Asiatic Co., Inc. Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial and/or Remittitur, be, and the same hereby is, denied.

DONE IN OPEN COURT this 2nd day of October, 1987.

/s/ Shannon Wetherall
SHANNON WETHERALL
Judge

Presented by:

LANE POWELL MOSS & MILLER

By: /s/ Rudy A. Englund
JOHN R. TOMLINSON
RUDY A. ENGLUND
MICHAEL B. KING
Attorneys for Defendants
The East Asiatic Co., Ltd.
and The East Asiatic Co., Inc.

Copy Received; Approved as to Form;
Notice of Presentation Waived:

HACKETT, BEECHER & HART

By: /s/ James M. Beecher
JAMES M. BEECHER
STEPHEN M. MORIARTY
Attorneys for Corporate Plaintiffs

SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

---

84 2 16023 3

*Clerk's Action Required*

RSR CORPORATION, *et al.*,
*Plaintiffs,*

vs.

BERGSOE METAL CORPORATION;
PAUL BERGSOE & SONS A/S;
THE EAST ASIATIC CO., INC.;
and THE EAST ASIATIC CO., LTD.,
*Defendants.*

---

# AMENDED JUDGMENT AGAINST THE EAST ASIATIC CO., INC. AND THE EAST ASIATIC CO., LTD. AND PAUL BERGSOE & SONS A/S AND ORDER STRIKING PRIOR JUDGMENTS DATED AUGUST 21 and SEPTEMBER 11, 1987

---

## JUDGMENT SUMMARY

| | |
|---|---|
| Judgment Creditors: | RSR Corporation, Quemetco, Inc. and Quemetco Realty, Inc. |
| Judg. Creditors' Attys: | James M. Beecher<br>Stephen M. Moriarty<br>1801 Bank of California Center<br>Seattle, Washington 98164<br>(206) 624-7840 |
| Judgment Debtors: | The East Asiatic Co., Inc.,<br>The East Asiatic Co., Ltd. and<br>Paul Bergsoe & Sons A/S |
| Amount of Judgment: | $19,445,000.00 |
| Taxable Costs and Attorney Fees: | $1,539.00 |

THIS MATTER having come on before the Honorable Shannon Wetherall, sitting with jury on July 6, 1987, the plaintiff RSR Corporation and its subsidiaries Quemetco, Inc. and Quemetco Realty Inc. being represented by James M. Beecher and Stephen M. Moriarty and defendants East Asiatic Co., Inc. and East Asiatic Co., Ltd. being represented by John Tomlinson, Rudy Englund and Michael King; defendant Paul Bergsoe & Sons A/S having voluntarily withdrawn its participation in this matter and not appearing at trial; testimony having been presented and exhibits submitted into evidence, the jury, having returned its verdict on the issue of liability on August 11, 1987 in the form of answers to interrogatories which are attached hereto and incorporated herein as Exhibit A; the jury then having returned for the damages portion of the trial and testimony having been presented and exhibits submitted into evidence and the jury having returned its damages verdict on August 20, 1987 in favor of the RSR Corporation and against East Asiatic Co., Inc. and East Asiatic Co., Ltd. in the amount of $19,445,000.00 which is attached as Exhibit B; all claims of other individual plaintiffs having been fully settled during trial; all claims by or against defendant Bergsoe Metal Corporation having been separated out prior to trial, and defendants' post-trial motions having been denied this date and plaintiff's motion to enter judgment on the damages verdict of August 20, 1987 having been granted,

AND IT APPEARING that both the liability and damage verdicts against East Asiatic Co., Inc. and East Asiatic Co., Ltd. are unanimous, and defendant Paul Bergsoe & Sons A/S having been found to be in default, and the Court, being otherwise fully advised, and there being no just reason for delay in the entry of this final judgment, now, pursuant to CR 54(b), it is hereby expressly

ORDERED, AJUDGED AND DECREED that earlier judgments in this matter dated August 21 and September 11, 1987 be stricken;

AND FURTHER that judgment be and hereby is entered in favor of plaintiff RSR Corporation, Quemetco, Inc. and Quemetco Realty, Inc., and against defendants East Asiatic Co., Inc. and East Asiatic Co., Ltd., and Paul Bergsoe & Sons A/S in the principal amount of $19,445,000.00, together with plaintiffs' costs and statutory attorney fees in the amount of $1,539.00.

DONE IN OPEN COURT this 11th day of September, 1987.

/s/ Shannon Wetherall
JUDGE SHANNON WETHERALL

Presented by:

HACKETT, BEECHER & HART

/s/ James M. Beecher
JAMES M. BEECHER
Attorney for Plaintiffs

SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

---

84 2 16023 3

*Clerk's Action Required*

RSR CORPORATION, *et al.*,
*Plaintiffs,*

vs.

BERGSOE METAL CORPORATION;
PAUL BERGSOE & SONS A/S;
THE EAST ASIATIC CO., INC.;
and THE EAST ASIATIC CO., LTD.,
*Defendants.*

---

AMENDED JUDGMENT AGAINST THE EAST ASIATIC CO., INC. AND THE EAST ASIATIC CO., LTD. AND PAUL BERGSOE & SONS A/S

(AWARDING JUDGMENT ON VERDICT ENTERED HEREIN ON AUGUST 21, 1987)

THIS MATTER having come on before the Honorable Shannon Wetherall, sitting with jury on July 6, 1987, the plaintiff RSR Corporation and its subsidiaries Quemetco, Inc. and Quemetco Realty Ins. being represented by James M. Beecher and Stephen M. Moriarty and defendants East Asiatic Co., Inc. and East Asiatic Co., Ltd. being represented by John Tomlinson, Rudy Englund and Michael King, and defendant Paul Bergsoe & Sons A/S having voluntarily withdrawn participation in this matter and not appearing at trial, and testimony having been presented and exhibits submitted into evi-

dence, the jury, having returned its verdict on the issue of liability on August 11, 1987 in the form of answers to interrogatories which are attached hereto and incorporated herein as Exhibit A, and the jury then having returned for the damages portion of the trial and testimony having been presented and exhibits submitted into evidence and the jury having returned its verdict on August 21, 1987 in favor of the RSR Corporation and against East Asiatic Co., Inc. and East Asiatic Co., Ltd. in the amount of $16,147,000.00 which is attached as Exhibit B; all claims of other individual plaintiffs having been fully settled during trial; and all claims by or against defendant Bergsoe Metal Corporation having been separated out prior to trial.

AND IT APPEARING that both verdicts against East Asiatic Co., Inc. and East Asiatic Co., Ltd. are unanimous, and defendant Paul Bergsoe & Sons A/S having been found to be in default, and the Court, being otherwise fully advised, and there being no just reason for delay in the entry of this final judgment, now, pursuant to CR 54(b), it is hereby expressly

ORDERED, ADJUDGED AND DECREED that judgment be and hereby is entered in favor of plaintiff RSR Corporation, Quemetco, Inc. and Quemetco Realty, and against defendants East Asiatic Co., Inc. and East Asiatic Co., Ltd., and Paul Bergsoe & Sons A/S in the principal amount of $16,147,000.00, together with plaintiffs' costs and statutory attorney fees in an amount to be determined by supplemental cost bill.

JUDGMENT SUMMARY

| | |
|---|---|
| Judgment Creditors: | RSR Corporation, Quemetco, Inc. and Quemetco Realty, Inc. |
| Judg. Creditors' Attys: | James M. Beecher<br>Stephen M. Moriarty<br>1801 Bank of California Center<br>Seattle, Washington 98164<br>(206) 624-7840 |

| | |
|---|---|
| Judgment Debtors: | The East Asiatic Co., Inc.,<br>The East Asiatic Co., Ltd. and<br>Paul Bergsoe & Sons A/S |
| Amount of Judgment: | $16,147,000.00 |
| Taxable Costs and Attorney Fees: | To be determined |

DONE IN OPEN COURT this 11th day of September, 1987.

/s/ Judge Shannon Wetherall
JUDGE SHANNON WETHERALL

Presented by:

HACKETT, BEECHER & HART

/s/ James M. Beecher
JAMES M. BEECHER
Attorney for Plaintiffs

SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

---

84 2 16023 3

RSR CORPORATION, *et al.*,
*Plaintiffs,*

v.

BERGSOE METAL CORPORATION; PAUL BERGSOE & SONS A/S; THE EAST ASIATIC CO., INC.; and THE EAST ASIATIC CO., LTD.,
*Defendants.*

---

## JUDGMENT ON JURY VERDICT

THIS MATTER having come on before the Honorable Shannon Wetherall, sitting with jury on July 6, 1987, the plaintiffs being represented by James M. Beecher and Stephen M. Moriarty and defendants being represented by John Tomlinson and Rudy Englund, and testimony having been presented and exhibits submitted into evidence, the jury, having returned their verdict on the issue of liability on August 11, 1987 in the form of answers to interrogatories which are attached hereto and incorporated herein as Exhibit A, and the jury then having returned for the damages portion of the trial and testimony having been presented and exhibits submitted into evidence and the jury having returned their verdict on August 21, 1987 in favor of the plaintiffs in the amount of $16,147,000.00.

AND IT APPEARING that both verdicts are unanimous, and the Court, being otherwise fully advised, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that judgment be and hereby is entered in favor of plaintiffs and against defendants in the principal amount of $16,147,000.00, together with plaintiffs' costs and statutory attorney fees in an amount to be determined by supplemental cost bill.

JUDGMENT SUMMARY

| | |
|---|---|
| Judgment Creditors: | RSR Corporation, Quemetco, Inc. and Quemetco Realty, Inc. |
| Judg. Creditors' Attys: | James M. Beecher<br>Stephen M. Moriarty<br>1801 California Bank Center<br>Seattle, Washington 98164<br>(206) 624-7840 |
| Judgment Debtors: | The East Asiatic Co., Inc. and The East Asiatic Co., Ltd. |
| Amount of Judgment | $16,147,000.00 |
| Taxable Costs and Attorney Fees: | To be determined by supplemental cost bill. |

DONE IN OPEN COURT this 21st day of August, 1987.

/s/ Shannon Wetherall
JUDGE SHANNON WETHERALL

Presented by:

HACKETT, BEECHER & HART

/s/ James M. Beecher
JAMES M. BEECHER
Attorney for Plaintiffs

SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

---

No. 84 2 16023 3

RSR CORPORATION, *et al.*,
*Plaintiffs*,

v.

BERGSOE METAL CORPORATION; *et al.*,
*Defendants*.

---

VERDICT FORM

[Filed Aug. 21, 1987]

WE, THE JURY, find for the plaintiff in the sum of $16,147,000.

/s/ Patricia A. Olds
Foreman
8/21/87
9:50 a.m.

SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

---

NO. 84 2 16023 3

RSR CORPORATION, *et al.*,
*Plaintiffs,*

v.

BERGSOE METAL CORPORATION; *et al.*,
*Defendants.*

---

## VERDICT FORM

[Filed Aug. 20, 1987]

WE, THE JURY, find for the plaintiff in the sum of $19,445,000.

/s/ Patricia A. Olds
Foreman
8/20/87
3:45 P.M.

| | |
|---|---|
| $ 6,227,000 | |
| —1,444,000 | |
| +2,166,000 | |
| $ 6,949,000 | Past Loss |
| +6,498,000 | +3 yrs @ 1987 Rate |
| 13,447,000 | |
| +6,498,000 | + 3 yrs Penalty for Fraud |
| $19,945,000 | |
| —500,000 | Rec'd for Sale |
| $19,445,000 | Total Damages |

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

---

No. 84-2-16023-3

RSR CORPORATION, QUEMETCO, INC., and QUEMETCO REALTY, INC., KITONG PAK, PAULINO PABLO, DENNIS SAMUELSON, SILVIO BARISIC, GARY LINDERS, MICHAEL J. EDRIS, JAMES NACHLINGER, HELEN KOTTKE, RUDOLPH GONALEZ, and JOHN GEPPERT,

*Plaintiffs,*

v.

BERGSOE METAL CORPORATION;
THE EAST ASIATIC CO., INC.;
THE EAST ASIATIC CO., LTD.,

*Defendants.*

---

VERDICT FORM A
BREACH OF CONTRACT

You have been instructed on the elements of breach of contract governing the RSR plaintiffs' claim that BMC breached a contract between it and the RSR plaintiffs. You are requested to answer the following questions.

1. Was the agreement between BMC, RSR Corporation (Quemetco and Quemetco Realty) a contract?

| (Yes) | (No) |
|---|---|
| X | |

If your answer to question No. 1 is "No," do not answer questions 2-5 set forth in this special verdict form concerning the plaintiff's breach of contract claim. Instead, proceed to Verdict Form B.

2. Did BMC materially breach the contract?

| | |
|---|---|
| X | |
| (Yes) | (No) |

If your answer to question No. 2 is "No," do not answer questions 3-5 set forth in this special verdict form concerning the RSR plaintiffs' breach of contract claim. Instead, proceed to Verdict Form B.

3. Did the RSR plaintiffs suffer damages proximately caused by such breach?

| | |
|---|---|
| X | |
| (Yes) | (No) |

If your answer to question No. 3 is "No," do not answer questions 4-5 set forth in this special verdict form concerning the RSR plaintiffs' breach of contract claim. Instead, proceed to Verdict Form B.

4. Was BMC relieved from performance of the contract?

| | |
|---|---|
| | X |
| (Yes) | (No) |

If your answer to question No. 4 is "Yes," do not answer question No. 5 set forth in this special verdict form concerning the RSR plaintiffs' breach of contract claim. Instead, proceed immediately to Verdict Form B.

5. Should BMC's corporate form be disregarded and the EAC defendants held liable for any BMC breach of contract?

| | |
|---|---|
| X | |
| (Yes) | (No) |

/s/ Patricia A. Olds
Foreman

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

---

No. 84-2-16023-3

RSR CORPORATION, QUEMETCO, INC., and QUEMETCO REALTY, INC., KITONG PAK, PAULINO PABLO, DENNIS SAMUELSON, SILVIO BARISIC, GARY LINDERS, MICHAEL J. EDRIS, JAMES NACHLINGER, HELEN KOTTKE, RUDOLPH GONALEZ, and JOHN GEPPERT,

*Plaintiffs,*

v.

BERGSOE METAL CORPORATION;
THE EAST ASIATIC CO., INC.;
THE EAST ASIATIC CO., LTD.,

*Defendants.*

---

VERDICT FORM B
FRAUD AND DECEIT

You have been instructed on the elements of fraudulent inducement governing the RSR plaintiffs' claim that the RSR (Quemetco)-BMC agreement was fraudulently induced. You are requested to answer the following questions. Please indicate your answer by placing an "X" above the appropriate line.

1. Did BMC make any false representation to the RSR plaintiffs with the intent to induce the RSR plaintiffs to rely upon it?

| (Yes) | (No) |
|---|---|
| X | |

If your answer to question No. 1 is "No," do not answer questions Nos. 2 and 3 set forth in this special verdict

form concerning the RSR plaintiffs' fraudulent inducement claims. Instead, proceed to question No. 4.

2. Did the RSR plaintiffs suffer pecuniary loss proximately caused by their justifiably relying on any such false representation intentionally made by BMC?

| | |
|---|---|
| X | |
| (Yes) | (No) |

If your answer to question No. 2 is "No," do not answer question No. 3 set forth in this special verdict form concerning the RSR plaintiffs' fraudulent inducement claims. Instead, proceed to question No. 4.

3. Should BMC's corporate form be disregarded and the EAC defendants held liable for any BMC fraudulent inducement?

| | |
|---|---|
| X | |
| (Yes) | (No) |

4. Did the EAC defendants make any false representation with the intent to induce the RSR plaintiffs to rely on it?

| | |
|---|---|
| X | |
| (Yes) | (No) |

If your answer to question No. 4 is "No," do not answer question No. 5 set forth in this special verdict form concerning the RSR plaintiffs' fraudulent inducement claims. Instead, proceed immediately to question No. 6.

5. Did the RSR plaintiffs suffer pecuniary loss by justifiably relying on any false representation intentionally made by the EAC defendants?

| | |
|---|---|
| X | |
| (Yes) | (No) |

6. Is your finding that the EAC defendants are liable to the RSR plaintiffs for fraudulent inducement?

| | |
|---|---|
| X | |
| (Yes) | (No) |

/s/ Patricia A. Olds
Foreman
8/11/87

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

---

King County Cause No. 84-2-16023-3
Court of Appeals No. ————

RSR CORPORATION, *et al.*,
*Plaintiffs,*

vs.

BERGSOE METAL CORPORATION, *et al.*,
*Defendants.*

---

REPORTER'S TRANSCRIPT ON APPEAL

September 23, 1987

Before the Honorable Shannon Wetherall, Judge of the Superior Court for King County, Department No. 15

*APPEARANCES OF COUNSEL*

For Plaintiffs: James Beecher, Steven Moriarty, Max Boese and John Drury, Attorneys at Law.

For Defendants: John Tomlinson, Rudy Englund and Ronald Schaps, Attorneys at Law.

* * * *

[34] THE COURT: Thank you.

Thank you for your Briefs and all your consideration that you have given this case. When I first found out this was a jury case I was troubled [35] that you would present such a difficult case with such difficult issues to a jury. It is difficult enough for a judge, but that is a right you have, a right to a jury trial, and the decision was made. Now a decision has been made and there

have been some problems. Some of the problems I will respond to and I will respond to all of your oral argument and the briefs. I'll take one thing at a time.

I certainly take no sides in this particular case. I have no interest one way or the other except to make sure you have as fair a trial as possible. That's the only thing that I have tried to do, is make sure that a fair trial was had from the very beginning when we started to the present.

I will not state my own opinion on the facts, except where it is necessary to make a legal decision. I acknowledge that the size of the verdict is large, but I will speak to that issue separately.

I'm going to go over the facts of this case, and I don't mean the case itself, but what happened from the time of the verdict. I want to make sure that there is no misunderstanding, and if after I'm through you disagree with me on dates and times, we can make sure it is part of the record.

This case was a bifurcated jury trial which [36] commenced on July 6, 1987. After receiving evidence and deliberation the jury returned a verdict on the liability issues presented by the claims of RSR plaintiffs on August 11th, 1987. Thereafter, after receiving evidence regarding damage claims of the corporate plaintiffs the jury returned a general damages verdict on August 20th, 1987.

At approximately 4:10 p.m. on August 20th, counsel for all parties were present. The jury returned to open court at 4:16 p.m. with the verdict, which was read by the clerk. Before the clerk read the verdict I, as judge, looked it over. I did see that it had handwritten notes on the verdict form, that they were in pencil. The amount was in the proper blank and it was in the amount of nineteen million four hundred forty five thousand dollars. This Court notes that one was in ink in the proper place, the other was just on the edge of the paper, in the bottom lefthand side was a calculation in pencil.

At defense counsel's request the Court directed the jury to be polled. All twelve jurors answered that it was their individual verdict and it was the verdict of the jury. The verdict was then received and filed by the court clerk. The Court [37] excused the jury. The clerk's minutes state: "The jury is excused from further consideration of this case."

Next, the Court requested that all counsel review the verdict form. The Court indicated that there was some extra handwritten words and calculations on the general verdict form. This extra handwriting was not in the blank designated for the general verdict.

Now I am going to address this issue, even though you both do not seem to disagree on the issue, because I want to let you know I have considered it. At the time this happened it had never happened to me before. I have never dealt with this issue, and I was of the opinion that once it was on the verdict form, that that was the verdict of the jury, but that I felt it was necessary that you at least be aware of it. I could have had the jury go back in and erase everything on there. I felt that it was necessary that you look and be aware of what was on the verdict form, and that is the reason why I called your attention to it.

After examining the verdict form the defendants moved for a mistrial. The ruling was reserved. The plaintiffs then moved to have the jury [38] reconvened and returned to the juryroom to reread their instructions, review the verdict form, and further deliberate upon a verdict.

The Court denied the defendant's motion for a mistrial.

The bailiff then expressed to the Court that he had discussed the fairness of the verdict with the jurors after they had been discharged.

At 4:35 p.m. the jury returned to open court. The Court explained to the jury that they would have to return to the juryroom to reconsider the jury verdict, pur-

suant to the Court's instructions, and you are aware of the Court's instructions.

The jury again retired to the juryroom at 4:39 p.m. for further deliberation upon the verdict. Defendants renewed their motion for a mistrial, which was denied.

The defendants proceeded to submit a supplemental instruction regarding the jury's award which may have calculated a penalty for fraud. The Court modified this proposed instruction. Both sides presented exceptions to the proposed instruction.

The defendants moved for a directed verdict to delete the amount indicated for penalty for fraud. [39] The motion was denied.

The jury returned to open court at 5:25 p.m. After being read the supplemental instruction the jury retired to deliberate with an original and a blank verdict form.

The Court granted the defendant's motion for individual voir dire of the jury as to the award and outside communication matters. The record will speak for itself as to questions and answers.

The jury returned to open court at 10:52 p.m. on August 21st with the following verdict, which was read by the Court in the presence of counsel for all parties: "The jury finds for the plaintiff in the amount of sixteen million one hundred forty seven thousand dollars."

After polling the jury, the verdict is received and filed.

The Court individually voir dired each juror on the following issues: Did any court personnel have any influence on your verdict? These were the issues, not the questions; and, two, does the verdict reflect any punitive damages? All twelve jurors responded no to both issues.

The Court excused the jury from further consideration of this cause. The bailiff was then [40] sworn and examined by counsel. The defendants renewed their motion for a mistrial. Again that motion was denied.

The defendants moved for a directed verdict deducting the six million four hundred ninety eight thousand

dollar penalty amount in question. The Court denied the motion.

Finally the defendants moved for a new trial and/or a judgment notwithstanding the verdict.

At that time I felt it was necessary that you bring any motions that you have, such as a motion for reconsideration, at which time I would have time to research the matter, which research began the very next day. I wish that I could have held the jury until I did my research then come back with a decision.

That wasn't done, so now we are presented with some questions. The questions that I'm answering today, which you have also responded to, are: Was the jury verdict and the discharge of August 20th, 1987 a final disposition, such that the jury could not be reconvened?

Should the judgment, notwithstanding verdict, be granted?

Should the defendant's motion for a new [41] trial be granted?

Should the jury verdict be altered by the Court?

Did the extraneous writing and calculations on the jury form alter the jury's general verdict?

Did the bailiff's communication with the jury necessitate a new trial?

I'd like to start with the bailiff's communication with the jury, because this issue did come up. You have not addressed it, but I want any appellate court looking at this to know that it has been considered by the Court. At the time I had not researched it. I was not quite sure to what extent communication by a bailiff, in and of itself, would be sufficient to set aside a verdict.

It appears that the courts have protected the jury from outside influences. All cases appear to state that a bailiff cannot have communication with the jury. Even if the jury states that it is not influenced, cases seem to follow that if it is even possible, or probable, that there has been communication, that would taint the jury. I won't cite the cases involved. You have not raised this issue, but the Court's conclusion is that the communica-

tion by the bailiff to the jury would render [42] the second verdict invalid. That once the jury deliberation was broken the deliberations were irrevocably tainted.

However, this analysis assumes that the first verdict is not upheld because the Court finds that the communication between the bailiff and the jury occurred after the jury had given its verdict and had been excused. In almost all cases after the jury is excused they have communication with the press, with the attorneys, and they have communications with bailiffs. So, the finding that I now give you relates only to the second verdict.

The issue that concerned me immediately after the trial was the jury discharge of August 20th, 1987. Was that a final disposition, such so that the jury could not be reconvened? RCW 44.444.460 provides Washington law as to receiving a verdict, and as to receiving a jury. The Court's interpretations of statute appear to be consistent. They have consistently held after the verdict has been received and recorded and the jury discharged, the jury can no longer be reconvened and function as a jury. That is not just a technicality. Was the jury home? Did they go home overnight? Was it an hour? Half hour? It appears from what I understand [43] the law is that once the judge has said, you are excused, the verdict is accepted and filed, that is the end and they cannot be reconvened. It appears what happened in this case is that the Court did not have the right to send the jury back to reconsider its verdict.

Our court clerk's minutes are important in this issue because they are specifically clear that the clerk stamped "received and filed" on the verdict and the jury was excused from further consideration, which is part of the court minutes.

Although there have been some cases, particularly the EDWARDS case, which have made an exception, this Court finds that the exception in the EDWARDS case does not fit in this case. The Court feels that there are no exceptions, and that the finding of the nineteen mil-

lion four hundred forty four thousand dollar verdict is the only proper one between the two.

The next issue was the extraneous writings and calculations on the jury form and whether that alters the jury's general verdict. The general rule is that if a verdict shows the plain intent of the jury, and is sufficient under the issues, the Court may accept and record and treat any informal notes on [44] the verdict form as surplusage.

From this Court's reading the clear intent of the jury in the RSR case was to find for the plaintiffs in the amount of nineteen million four hundred forty five thousand.

I will speak to the penalty totally separate.

The verdict was a general verdict for the plaintiffs and the added notations were surplusage. This Court finds that any added writing is to be disregarded by the Court.

Looking at the ROWE v. SAFEWAY case, which you cited—and I have the exact quotation that you cited here before me. ". . . informal language injected into a verdict by the jury may be of such a character as to render it fatally vague and contradictory." The question is not whether that language rendered it vague, ambiguous and contradictory but whether "the intent of the jury is clearly indicated and the verdict is otherwise sufficient, the informal portions should be disregarded as surplusage. Treating gratuitous, explanatory remarks which a jury may append to its general verdict as a special finding of fact, or as a guide in determining how the jury may have resolved [45] the factual issues, would invite surmise and conjecture and lead to confusion."

On this issue, so that I make it clear on the record, the Court made no finding before the second verdict that the word "penalty" in that handwriting meant punitive damages. I specifically spoke to that issue. I said that word could be interpreted in more than one way. I have the dictionary in front of me. I even looked it up in open court to see what other definition it could have. I

made no interpretation, as a Court, on the word "penalty."

I did ask, however, that the bailiff save all writings of the jury, not that it can be used for my purposes, that would be a totally separate issue which I'm not addressing today, but I wanted to make sure that nothing was destroyed, so all has been kept available. If it is to be allowed by the appellate court it is available. I'm not addressing that issue, I'm just saying that I immediately made sure that everything was kept.

Looking at the SUNSET OIL case, again quoting from SUNSET: "Even assuming that the handwritten memorandum was delivered to the court by a foreman of the jury, it should nevertheless be [46] disregarded as extraneous and superfluous. It did not appear the court instructed the jury to make any specific findings upon the particular questions of fact, or to return separate verdicts upon each of the six causes of action pleaded by respondents."

In this case the Court did not request that the jury make specific findings. In fact, in gest one of the attorneys said, "You should have erased what was on there." Obviously, the Court would never do that, but had the jury never written it on there we would not be able to get into the minds of the jury. The opinions and thoughts and process of the jury in reaching a verdict, this Court finds, cannot be questioned. The defendants appeared to me to recognize that during the voir dire of the jury. There was an objection, when the questions were asked about the prejudice of the bailiff and any bailiff influence the contact might have had, that you cannot look into the minds of the jurors.

The law is clear to this Court that the jury members cannot be heard to impeach their verdict by divulging their methods after arriving at a verdict, even if it is clear the jurors misapplied factual or legal matters.

The defendants argue that the jury award [47] should be reduced, following the Court's cautionary instruction,

the fact they came back with a reduced verdict. This Court finds that that second verdict was a nullity, as if it does not exist. The Court had no authority to send the jurors back.

The informal language and the calculations injected into the general verdict by RSR, this Court finds, did not render the verdict fatally vague, ambiguous or contradictory. The informal portions should be, and are to be, disregarded as surplusage. This is especially true in this case where the intent of the jury was clearly indicated on the general verdict form.

Reasonable minds may differ on what the word "penalty" means. Reasonable minds may differ on the handwriting, but it is still clear that the jury intended that the verdict be in the nineteen million plus amount.

The Court moves on to the next question, and that is: Should the judgment notwithstanding the verdict be granted? Upon research on this issue the motion for a judgment NOV should not be granted unless the Court can say, as a matter of law, that there is neither evidence nor reasonable inference sufficient to sustain a verdict. Under CR 50: "A [48] party is entitled to a judgment notwithstanding the verdict when viewing the evidence and reasonable inferences the court can say as a matter of law that there is no substantial evidence supporting the verdict. Substantial evidence is evidence that would convince an unprejudiced person of the truth of the facts to which the evidence is directed. Substantial evidence must be more than a mere scintilla of evidence and more than theory or speculation."

Counsel has argued that there were several issues, the first being the dominion and control, on the issue of corporate disregard. That the minority interests of EAC had given them insufficient ties. Concerning the LOWENDAHL case, the argument that multiple factors must be established, that it took a combination of factors not just any two, and this Court finds that that LOWENDAHL test was satisfied, in that there was substantial

evidence to find corporate disregard. There was substantial evidence to find dominion and control.

On the fraudulent inducement, the argument that there was no connection with the contract when the contract was formed, at the time of the breach, this Court finds there was more than a scintilla of evidence, there was substantial evidence which was [49] produced by plaintiff on the issue of the lawyers, the EAC lawyers, and that was a jury question.

The fact that the person who testified is now a judge, Judge Harris, does not make him more truthful than any other witness and the jury may disregard that evidence. There were questions on direct and there were questions on cross-examination of that witness. The Court finds that on those issues there was sufficient evidence.

The trial court, from my reading, does not exercise just discretion, as it can on other motions, on a motion for judgment notwithstanding verdict, but rather assumes the truth of the non-moving party's evidence and all the reasonable inferences therefrom, views all the evidence in the light most favorable to the non-moving party and must deny the motion whenever there is substantial evidence to support the non-moving party.

The Court in this case denies the motion. And now that I have looked at the cases, I feel that my ruling was correct. The motion for judgment NOV is denied.

The next question is: Should the defendant's motion for a new trial be granted? Again, under Civil Rule 59: "A new trial may be [50] granted upon a motion of a party or on the initiative of the court for any one of eight enumerated causes materially affecting the substantial rights of the party aggrieved."

The defendants have not demonstrated that, one, substantial justice has not been done in this case. This Court finds that all parties were granted all rights of proper procedures; that their rights were not in any way—which would be number two—that their rights were not materially affected.

I will get to the penalty separately.

CR 59 and RCW 4.76.020 sets forth the grounds for granting a new trial. The trial court's responsibilities are stated in case law, and the trial court does have the duty to see that justice prevails. The Court has the power and the exercise and discretion to grant a new trial where substantial justice has not been done. But to facilitate review the judge must state the reasons, and for that reason I'm going carefully into this.

The defendant's strongest argument for the granting of a new trial, I would say, would be grounded on CR 59 (a) (1): "The irregular proceedings of the Court, the jury or any of the adverse parties, or any order of the Court, or abuse [51] of discretion, by which the parties were prevented from having a fair trial."

The Court does not find that the adverse party in any way contributed to what happened in this case. That it was not necessarily any doing of the Court. This is something that hapepned which was a surprize to everyone. The defendants argue that the jury's considerations of the issues in this case and its ultimate verdict became tainted by its failure to properly follow the Court's instructions and the intervening communications with the Court's bailiff.

Setting aside the bailiff's communication and the second verdict as being a nullity, the Court will consider only the first verdict form. They argue that East Asiatic companies were prevented from having a fair trial and, therefore, a new trial should be granted. These arguments should stand only if this Court, in its discretion, determined that the actions of the jury materially affected the rights of the defendants.

Since the Court has set aside the second verdict altogether, and I said we would not consider the bailiff's comments, we will now look at the writings on the form. Specifically looking at the word "penalty," the Court finds that it can not look [52] into the mind of the jury as to the word "penalty." The trial courts do have a

wide discretion in granting or refusing new trials. This was a five-week trial. It was a very complex trial. This issue will go to appeal regardless of what I do one way or the other. I do not feel that as a judge I can get into the minds of the jury and determine what the word "penalty" means. I have already ruled that the entire pencil written portion on the jury form is to be disregarded entirely.

This Court finds that the defendants have not made a strong showing that that occurrence has materially affected the substantial rights of the party. The motion is denied.

I understand that the evidence that has been presented on the liability issue and on the damages issue, that there has been evidence on both sides. This Court finds there is substantial evidence to support a verdict of nineteen million four hundred forty five thousand. There was evidence for over forty million and the Court finds that that is within the evidence and the Court will allow that to stand.

Now, because of the word "penalty," should the jury verdict be altered by the Court, that is, [53] reduce the verdict? A motion to reduce a verdict on the ground that it is excessive, again, is left to the discretion of the trial court.

From what I have read the jury is given a considerable latitude in making its determination when the subject matter is difficult to prove and cannot be fixed with any mathematical certainty. In this case there were many figures given to the jury. Whether substantial justice was done depends on large degree on whether the verdict was so excessive and mistakenly incorrect to indicate passion and prejudice.

From this point I will look at the passion and prejudice of the jury, as alleged. Here the evidence presented does not provide the jury with a basis for its verdict and does not indicate passion and prejudice. I listened to the evidence very carefully. I listened to all the persons

who testified on the issue of liability and on the issue of damages. Expert witnesses on both sides, with excellent credentials, presented a different theory. The underlying figures were similar but they used a different basis to come to a conclusion as to what was the value to RSR rather than how much profit was made.

[54] Under the Constitution, Article I, Section 21, there is a strong presumption that the verdict is adequate and the Court cannot, after a fair trial, substitute its conclusions for that of the jury on conflicting evidence as to amounts of damage. The jury is the final arbitor of evidence, being limited only in the sense that it be supported by the evidence. As I said earlier, I feel that the evidence definitely was supported. All of the evidence was supported by competent testimony.

The jury then had to make a decision, which expert witness were they going to believe? The owner of the company was present. He testified. Obviously he was a persuasive person, during his testimony. It appeared to this Court that the jury was in total attention during all the time that all the witnesses testified regarding damages. The jury was taking notes. They were using their notepads, and they were listening to all the testimony. It did not appear to this Court they closed their minds or had blinders on to any one witness and not to another. They were listening attentively during the entire testimony.

When the verdict is so high that it would indicate passion or prejudice the Court certainly can set that aside, but this Court, again, finds that the [55] evidence, looking at it as to what was the loss to RSR, that theory rather than lost profits, that there is sufficient evidence that the Court cannot in any stretch of the imagination find there was passion or prejudice of the jury.

The defendants have cited RCW 4.76.030 to provide authority for the reduction of the jury verdict. In quotes: "If the trial court shall, upon motion for new trial, find the damages awarded by the jury were so

excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial, or may enter an order providing for a new trial, unless the party adversely affected shall consent to reduction of the increase of such verdict."

There has been no such consent. I'm assuming there is no consent to reduce the verdict. The Court finds in conclusion that the verdict does in every respect follow the evidence; that it is not outrageous; that it is not in any way out of line. Even though I acknowledge—and I did not know it at the time, that is the largest verdict in the State of Washington, or that is what I've heard—this Court still finds that it is within the evidence, that [56] there was credible evidence, and for that reason the motions are denied, both for the remittitur and, of course, for the new trial, having to do with the same issue. The Court will not get behind the minds of the jury on the word "penalty."

Any questions?

MR. BEECHER: I prepared a judgment form that I have shared with opposing counsel, that I believe is in keeping with the Court's ruling.

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IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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84 2 16023 3
COA NO. 21019-0-1

Taking of the Verdict

RSR CORPORATION, *et al.*,
*Plaintiffs,*

BERGSOE METAL CORPORATION,
THE EAST ASIATIC COMPANY, LTD., and
THE EAST ASIATIC COMPANY, INC.,
*Defendants.*

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VERBATIM REPORT OF PROCEEDINGS
BEFORE
THE HONORABLE SHANNON WETHERALL

Volume 30
Pages 4316-4357

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August 20, 1987
King County Courthouse
Seattle, Washington

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APPEARANCES

For Plaintiff RSR Corp:
JAMES BEECHER
STEPHEN MORIARTY

For Individual Plaintiffs:
JOHN DRURY
MAX BOESE

For Defendant EAC:
RUDY ENGLUND
MICHAEL KING

* * * *

[4317] THE COURT: Please pass it back. Counsel may wish to look at the verdict form. The verdict has a total sum, then they have broken it down in parts and penciled it in, so you may wish to look at how they've broken that down.

At this time, I wish to thank you. You've spent many, many days, weeks, on this case. You have been so very diligent. I can really say that this is one of the hardest working juries I have ever had the good fortune to meet. I understand at this time that you are permanently excused. I'm sure that you do not want to be professional bailiffs or clerks or judges, and spend your entire life doing this, but your service certainly is appreciated.

I have read your message to the attorneys, and for those persons who are willing to speak with the attorneys, you may wish to stay and talk with them. The remaining jurors are permanently excused. Mr. Boe has a certificate for you. I wish we could give you more than a certificate. Thank you very much. You are excused.

MR. ENGLUND: Your Honor, just one quick matter. Defendants would appreciate it if we could poll [4318] the jury.

THE COURT: Yes. As to the total amount, the poll will be the question whether this is your verdict and just to the total amount, just yes or no.

THE CLERK: Harvey Hiller, is this your individual verdict?

JUROR MILLER: Yes.

THE CLERK: And the verdict of the jury?

JUROR MILLER: Yes.

THE CLERK: Patricia Olds, is this your individual verdict?

JUROR OLDS: Yes.

THE CLERK: Is it the verdict of jury?

JUROR OLDS: Yes.

THE CLERK: Gary Armour, is this your individual verdict?

JUROR ARMOUR: Yes.

THE CLERK: Is it the verdict of the jury?
JUROR ARMOUR: Yes.
THE CLERK: Margaret Agnesani, is this your individual verdict?
JUROR AGNESANI: Yes.
THE CLERK: Is is the verdict of the jury?
[4319] JUROR AGNESANI: Yes.
THE CLERK: Lisa Langley, is this your individual verdict?
JUROR LANGLEY: Yes.
THE CLERK: Is it the verdict of the jury?
JUROR LANGLEY: Yes.
THE CLERK: Terry Schliebe, is this your individual verdict?
JUROR SCHLIEBE: Yes.
THE CLERK: And the verdict of the jury?
JUROR SCHLIEBE: Yes.
THE CLERK: Charles McIntyre, is this your individual verdict?
JUROR MCINTYRE: Yes.
THE CLERK: Is it the verdict of the jury?
JUROR MCINTYRE: Yes.
THE CLERK: Marsha Hardy, is this your individual verdict?
JUROR HARDY: Yes.
THE CLERK: Is it the verdict of the jury?
JUROR HARDY: Yes.
THE CLERK: Betty Mashak, is this your [4320] individual verdict?
JUROR HARDY: Yes.
THE CLERK: Is it the verdict of the jury?
JUROR HARDY: Yes.
THE CLERK: Colleen Ames, is this your individual verdict?
JUROR HARDY: Yes.
THE CLERK: Is is the verdict of the jury?
JUROR HARDY: Yes.

THE CLERK: Lorrie Kilp, is this your individual verdict?

JUROR KILP: Yes.

THE CLERK: Is it the verdict of the jury?

JUROR KILP: Yes.

THE CLERK: Mary Furuta, is this your individual verdict?

JUROR FURUTA: Yes.

THE CLERK: Is it the verdict of the jury?

JUROR FURUTA: Yes.

THE COURT: We know you all by now. Thank you very much. And you are excused.

[4321] (Jury out.)

THE COURT: Counsel, you may want to come forward.

(Discussion off the record.)

MR. ENGLUND: Your Honor, upon seeing the verdict form, I think insofar as the defendants read this, from the clear language here, the jury appears to have awarded some kind of punitive damages. Clearly, "three years penalty for fraud" is penciled in right here. We think that is totally inappropriate, outside the realm of the instructions, and we move for mistrial on that basis.

THE COURT: May I see that? Do you wish to respond before the jury leaves?

MR. BEECHER: I don't believe I have any response. I have to think about it.

THE COURT: Well, I do not wish to let the jury go until you have a response. Will you tell Gary to hold the jury.

There's a motion for a mistrial and before I let the jury go—

MR. BEECHER: Judge, my inclination would be to send the jury back and say: You have not responded appropriately. You have answered matters that you were not instructed upon.

[4322] There was no exception taken to the verdict form as submitted to the jury, and to ask the jury to go back and discuss this further and answer the only question that is before them, that is, the only question that the defendants had requested that they answer. So, that's—I formally move that that action be taken.

THE BAILIFF: Since you discharged the jury, I had some contact.

THE COURT: Anything else?

MR. ENGLUND: Your Honor, I think the fact that the jury has taken it upon themselves to introduce some line items here has now disclosed that clearly passion and prejudice has become involved in the jurors reaching a verdict in that situation, and I don't think that even the solution that Mr. Beecher would offer would resolve or remedy that situation. I think that the passion and prejudice has been done, the damage has been done. As I hear it now, even Mr. Boe has talked to the jury about the case.

From the defendant's standpoint, I think we must insist on our motion for mistrial. I think that the verdict itself, on its face, reveals that it has been reached inappropriately and not in accordance with the instructions, and I don't see how that can be [4323] remedied at this point.

MR. KING: Your Honor, if I could add, there's nothing about the jury verdict form that has anything to do with this particular problem or failure to except to the jury verdict form.

This jury has indicated that a tremendous quantity of its verdict reflects its desire to punish the East Asiatic Company defendants, and we don't see how any form of instruction or redeliberation can possibly effect that. The cat's out of the bag. It's unfortunate, but that's a pretty massive penalty sitting there, and that was not provided for in the instructions or in the evidence or under the law that governed the case.

MR. ENGLUND: In fact, there is no authority under Washington law, and the Court has specifically excluded punitive damages from this case by pretrial motion, our motion for summary judgment, where your Honor ruled that there will be no punitive damages in this case, and we now have the situation where it's sitting there loud and clear.

MR. BEECHER: I would urge that the case be sent back to the jury with the admonition that they read the instructions and that they answer the verdict form only as submitted to them, but also with the [4324] admonition that they are to read the jury instructions.

THE COURT: Anything further?

MR. MORIARTY: Well, I don't like to speak twice. Your Honor, I don't think it's right—I cannot assume on the face of that verdict form that passion and prejudice played a part.

THE COURT: I'm not assuming anything. And I'm not even assuming that "penalty" means the legal penalty. As far as I'm concerned, I'm not even assuming that, as I said, when they say "penalty," that they are not giving a certain amount for contract and a certain amount for fraud.

I do find that there is a valid motion before this Court, and that I'm going to listen to all of you, keep the jury there until a decision is made. I will make the decision, but I will not do it until I've heard from all of you.

MR. MORIARTY: In fact, I was going say, your Honor, that that figure which they're saying is the result of passion and prejudice really ties in with what Dr. Jolivet said was the net loss of the contribution to capital that the Seattle plant would have contributed to the corporation. And what they have called whatever they called it in the verdict form, I think Dr. Jolivet explained it as being what [4325] RSR did not receive in the form of contribution to capital—or corporate overhead—excuse me—during that time period.

That's what I read it as, and that's what they called it, and I think that's why we say that these matters really inhere in the verdict and we're not going to go into them. Normally that's the way matters such as this are treated. So I think what Jim is suggesting, you know, is appropriate. I mean, after all this length of trial and whatnot, that's the only way to deal with it.

THE COURT: Anything else before we bring the jury back in?

MR. BEECHER: I wonder if we could have an indication from Mr. Boe as to—well, I don't want to know what he learned from the jurors, but I would like the record to be clear as to whether there is any—you know, Mr. Boe and all the rest of us thought that it was over and it was totally appropriate to talk to the jury.

THE COURT: I have one question for Mr. Boe. Is there anything that the jurors said that would in any way lead you to believe there was passion and prejudice from the jury?

THE BAILIFF: Absolutely not. In fact, [4326] it was—the comments were that it was hard to come up with a figure but this one felt fair. That's—and they asked my opinion, and I agreed.

MR. ENGLUND: That's the problem that we're having—

THE BAILIFF: I have to be honest.

MR. ENGLUND: —if we have in a sense a judicially cloaked affirmation that their result is fair. If you look at the jury verdict form as the jury has answered it, the word there loud and clear is "penalty," and no matter how you look at it in the english language, a penalty in this situation is a punitive award, and there is no justification under the law or under the instructions for the inclusion of that kind of an award in the result that the jury has awarded.

So, whether we look at it in terms of passion and prejudice or penalty, the word is there very clearly on the form, and at this point, especially now with the affirma-

tion or discussions of fairness and whatnot, the defendants must respectfully insist that the motion for mistrial be granted.

MR. BEECHER: I don't think telling the jury that they apparently acted in a fair manner is tantamount to some kind of an influence of the jury.

[4327] THE COURT: At this time, would you please bring in the jury.

MR. ENGLUND: Are you going to be giving a ruling in front of the jury to the motion, your Honor?

THE COURT: The ruling as far as a mistrial is denied. We have to establish a record. I am going to send the jury back. I intend to tell the jurors that they must read the instructions; that there is no instruction that states that a penalty may be in any way imposed, the word "penalty." How they read "penalty," I don't know their definition for "penalty." Their definition for "penalty" may not be our definition, but I wish to state to the jury that there is no instruction on penalty, the word "penalty."

MR. ENGLUND: Well, we would request, your Honor, that they be told that as a part of their award, they cannot assess a penalty or make a punitive award.

THE COURT: I have that intent.

MR. ENGLUND: I wanted to clarify that.

MR. KING: The only thing we would add to that, your Honor, is that with all due respect, now that the jury—whatever the circumstances prompting it, the comment has been told that an officer of the court agrees that the judgment in total is fair. We [4328] don't see how the jury is going to be able to go back with any other inclination other than to validate their verdict.

THE COURT: The appellate court will have to make that decision. I am going to at least give the appellate court an opportunity to consider it after the jury has reconsidered all of the issues, and then I will have to leave it up to the appellate court.

MR. KING: Your Honor, I'd only add to that that that means that the East Asiatic Company will be faced with a verdict, eventually a judgment, potential substantial security costs to be imposed. We'll have to prosecute an appeal.

THE COURT: We will have to do that later. There will be an appeal probably regardless of which way this would go.

MR. BEECHER: I've heard rumor of that.

THE COURT: Because I have to assume that when this kind of money is at stake, that there will be an appeal either way. I would like the jury to have an opportunity to reconsider this.

MR. ENGLUND: Your Honor, before we—could I take a look at the jury verdict form, just—.

THE COURT: For the record, the jury has awarded $6,949,000 for past loss. They have added [4329] three years' interest at the 1987 rate; they have that as a total of 13,447,000. They have added "+3 yrs," and they have used the words "penalty for fraud," and what their definition of "penalty" is, I do not know. The total 19,945,000, subtracting 500,000 received for sale, for a total damages $19,445,000.

MR. MORIARTY: Your Honor, when you charge the jury again, plaintiffs would ask that you use the language essentially that you've just used before us that: I don't know what you mean by the word "penalty" but I would remind you that there's no provision for that in the instructions, and—excuse me—there's no provision for punitive award in the instructions. I'm concerned that they'll get the impression you're sending them back to subtract the $6 million, and I suspect—well, I don't want to get into that, but you understand plaintiff's concern.

THE COURT: I understand. At this time please bring in the jury.

(Jury in.)

THE COURT: I'm sorry to call you back. But something has occurred to the Court and to the attorneys, and it is necessary for me to send you back to reconsider this. I have a total sum. Then you have given the Court a breakdown. It was not necessary that [4330] you do a breakdown, but once you have done that, that calls to the Court's attention and to the attorney's attention that you may have considered something that was inappropriate.

Now, you may or may not have, but you are going to have to go back in, read your instructions over again. There is no instruction which awards any punitive award, that is, a penalty; only money may be awarded, not in the form of a punitive award. I ask that you go back and reconsider, look at your instructions, read them carefully, and then come up with what you consider a fair amount.

The bailiff tells me that he has spoken to you and someone asked him if he thought that was fair. I would like to make it very clear that the bailiff does not ever say that the amount is fair, but that you have been fair, and I have already told you that; that you have worked very hard, it's been evident to everyone how hard you have worked, how much effort at being fair you have put into this, and so anything that the jury does when they have considered all of the evidence and come up with an amount is a fair amount. We never tell the jury that they are not fair or they have been wrong.

But I do tell you that you have made or [4331] may have made an inappropriate calculation here or have considered something that is inappropriate. To the courts and the attorneys, every word has a legal meaning. That's why we use those instructions, and you may not have considered the word "penalty" to mean a punitive award. If you have, you cannot do so. If it means something else, then you have to go in and look at those instructions and decide what exactly you wish to do, and give the Court through a new verdict form a total amount. It may or may not be the same, but it must be done completely within the instructions that are given to you.

At this time, the jury may go back into the jury room.

(Jury out.)

MR. ENGLUND: Your Honor, while we are on the record, the defendants wish to make it clear that they continue to seek and move for a mistrial. We do not believe that the comments of the Court or the instructions or explanation or sufficient to undo the prejudice that has been done—

THE COURT: I understand and I have ruled on that, but before we go any further, if there is an additional instruction that you wish drafted to go into the jury room, I at this time invite you to draft such [4332] an instruction.

MR. ENGLUND: We are drafting one right now, your Honor.

THE COURT: We will have an opportunity to look at it, counsel will have an opportunity to comment on that instruction, but this is the time. If you wish to have an additional instruction to correct any misperception that the jury may have, I invite you to do so.

This has been a seven-week trial. This has not been a jury who has just willy-nillygone in there. It took them at least three days with the liability portion; it has taken them a long time with this portion. I do feel, from what I have seen, and the charge that came out after the first, that they have just considered it with the greatest of detail.

MR. ENGLUND: Your Honor, this is a trying time for all of us, and just to make our record, I respectfully take exception to the instructions or the explanation you gave to the jury to the extent I need to do that to preserve my right.

THE COURT: I understand.

MR. ENGLUND: I certainly except to that explanation. We are working on an instruction, which is again submitted without prejudice or waiver to our [4333] continuing motion for a mistrial.

THE COURT: Thank you.

(Pause in the proceedings.)

MR. ENGLUND: Your Honor, the language that we have here—and again, this would be submitted to the Court as a supplemental instruction without waiving our motion for a mistrial—the language is: "A penalty may not be awarded as any part of your verdict. A penalty is a form of punishment and such an award may not be given in this case."

MR. KING: We propose that it be given with expression direction to the jury as a supplemental paragraph to the Court's Instruction No. 3.

Your Honor, there was some initial discussion about, well, what did the jury mean by "penalty." I think that your Honor emphasized that lawyers place great emphasis on the meaning of words, but rather than starting with Black's Law Dictionary definition, I'd start with the Webster's New Collegiate Dictionary definition because I believe that gives us a better indication of what this jury likely thinks "penalty" means.

There are three definitions of "penalty": "1. Punishment for crime or offense; 2. The suffering, or the forfeit, to which a person [4334] subjects himself by agreement in case of nonfulfillment of stipulation; fine." That goes to something directed at a party like EAC and the defendants, posture of now making RSR whole. It's somebody in RSR's position.

Finally: "3. Loss"—again directed at a party in EAC's position—"due to some action, such as a violation of rules."

But most critical, I think, is No. 1: "Punishment for crime or offense." The plain meaning of that word in the english language is what it says, penalty, punishment.

I don't have the cases here at my fingertips, obviously, but I think if we went back to that first case in the state of Washington discussing what "punitive damage" means,

it means punishment. That's not available in this case.

If you look at the Black's Law Dictionary definitions, they're much more elaborate, but they either talk about sums of money which someone undertakes to pay out in the event of their omittting to perform or carry out the conditions—

THE COURT: Counsel, Black's Law Dictionary will speak for itself. You don't have to put that on the record.

[4335] MR. KING: Good point, but there are definitions in here that indicate that punishment—

THE COURT: I understand that, and the Court will send a corrective instruction.

MR. KING: Your Honor, the only point that we would—Mr. England has proposed a modification of our language.

MR. ENGLUND: Let me just write this out, your Honor, and then—

MR. KING: While Mr. Englund is writing, I just add for the record that even should the Court now give this instruction, we respectfully submit that given the Court's prior commentary about the meaning of "penalty," the comments about general fairness, et cetera, that we think we're going to have a classic case of inconsistent instructions, even if again in seriatim as it were, and we don't see how we can get out of that bollix, thus we continue to press for a mistrial as painful as they may be, under the circumstances of the 19th hour and 59th minute of this case.

THE COURT: I understand that.

MR. ENGLUND: The language that we have written here is: A penalty may not be awarded as any part of your verdict. A penalty is a form of punitive [4336] damages and such an award may not be given in this case.

MR. BEECHER: I take exception to that. I think that the law of the state of Washington is that punitive damages—well, I guess we're under New York law, but

the law applicable to this case is that punitive damages are not to be included, and I would simply ask, if an instruction is to be given in that respect, that the jury be told not—the instruction that is being asked for by the defendant basically says to the jury: Look, you fouled up. You got to take away $6 million. It's telling them "penalty," because that's the word that the jury chose, equates to punitive damages, and you can't have punitive damages.

We do not know what the jury means when it said "penalty." I suggest that we simply instruct the jury that punitive damages are not compensable under the law.

THE COURT: May I see the instruction?

MR. BEECHER: Or are not to be included.

THE COURT: Anything further?

MR. BEECHER: I guess that my basic position is that an additional instruction should not be given at this time to deal with a specific matter. This could have been dealt with by the defendants at the time the instructions to the jury were being requested. [4337] Since this has not been and since the jury has not been—well, the jury was fully instructed. If they read through those instructions and if they answer one question, they will have done at least in this area precisely what the plaintiffs and defendants were generally in agreement upon; that is, before the case went to the jury, we did not deal with an instruction on punitive damages. I think it inappropriate to do so now. I think the appropriate way to handle this is to simply tell the jury to re-read the instructions and to answer the question.

THE COURT: Anything further?

MR. KING: Yes, Your Honor, just very briefly. I don't think that the defendants were obligated to request an instruction on—that no penalty should be assessed. Punitive damages were out of the case. I think it's extraordinary to suggest that because no instruction was asked telling them that "compensation" also means—

THE COURT: The question now is whether to send them a special instruction on punitive damages or just tell them to read their instructions.

MR. KING: If you tell them to read the instructions, that would be obviously based on Mr. Beecher's reasoning that "penalty" is somehow [4338] ambiguous or obscure, and we respectfully submit that the jury has been straightforward in setting out a list of elements. They've used the word "penalty"; it has a plain meaning in the English language and we would be kidding ourselves that they did not know what that means.

MR. BEECHER: Well, the Court has alerted the jury to the scope of the problem here, and by calling the jury's attention to the problem and saying: Look, read the instruction, that is the best way to deal with the problem under the circumstances.

MR. KING: The instructions don't tell them about penalties. They need to be alerted.

THE COURT: I'm going to have an instruction that reads as follows: A penalty is a form of punitive damages. A penalty may not be imposed as any part of your verdict.

Any objection to that?

MR. ENGLUND: Other than continuing to reserve the objection—

THE COURT: I understand that.

MR. ENGLUND: —that we've made, Your Honor, that that appears to be roughly the equivalent of what we have submitted to you.

MR. BEECHER: I am concerned that the jury [4339] is being told: Look, one of the elements—

THE COURT: May I see the dictionary.

MR. KING: Certainly, Your Honor.

MR. BEECHER: —one of the elements that you chose to call "penalty" is inappropriate. I do not know either what they mean by "penalty" or what they mean by "three-year." I don't understand that. But giving an instruction and saying: Hey, your penalty portion is

wrong, I think would be inappropriate. I think it should be a more general thing: Look, we don't have punitive damages. Send it back on that basis.

THE COURT: May I see Black's. It is the punishment aspect of the word "penalty" that concerns you; is that correct?

MR. KING: The first meaning of the term "penalty" is a punishment, that is correct.

MR. ENGLUND: What we're talking about here, Your Honor, is the passion and prejudice element has creeped into this jury's award and they have—

THE COURT: Excuse me. I'm not sure that it has. You are alleging that it has.

MR. ENGLUND: And the other thing, as you had indicated in your—in the language of your tentative instruction, I think that you were referencing just a few moments ago that a penalty is [4340] equated—essentially, the equivalent of punitive damages in the case, and that's what we're objecting to.

MR. BEECHER: I would strongly urge we stay away from the word "penalty." Use "punishment," fine. Use "punitive": We don't allow punishment, that's fine, but to select a particular word that appears on the verdict form and say: No, that's wrong, is not at all appropriate. Substitute the word "punishment," possibly.

MR. ENGLUND: I think the problem is that the word "penalty" has creeped in here, and to try and pussyfoot around that means we're really only skirting the issue, and I guess this really gets back to why we believe the only real remedy is a mistrial in this situation.

THE COURT: I will have this typed: "A penalty is a form of punishment and is"—"penalty is a punishment and is a form of punitive damages and may not be imposed as any part of your verdict," period.

Because it is the punishment aspect that you are concerned with, the word "penalty," not it's other meanings.

MR. KING: And we find it very unlikely it has any other meaning to this jury.

[4341] THE COURT: Well, I am not speaking for the jurors. Would you have this typed up.

MR. MORIARTY: Your Honor, the plaintiffs would formally except to that instruction being given to the jury.

MR. ENGLUND: Well, the defendants also except in the context of we are asking for a mistrial.

THE COURT: I understand that. In lieu of a mistrial, you do not object to the instruction as the instruction itself; is that correct?

MR. ENGLUND: Could I hear the language one more time?

THE COURT: It's gone now.

(Discussion off the record.)

MR. MORIARTY: Are you going to keep them here tonight?

THE COURT: Certainly until they have the instructions.

MR. BEECHER: I don't see a basis for returning the first verdict form to them.

THE COURT: They have not asked for it. What is your position?

MR. ENGLUND: Let me think about that.

THE COURT: I'm sure they have been using notes, they have charts. They know what it is. It's [4342] not necessary that it go back. They have not asked for it.

MR. ENGLUND: Your Honor, I think essentially what we're saying is they have to take their verdict back, and as such, I suppose they should take it back with them so they know what it is. I mean, we've talked about the notes, but our position is that the form should go back there with them.

MR. KING: They should probably be given another form to fill out.

THE COURT: They are going to have blank form, yes.

MR. KING: And they should be instructed that the new verdict would be filled out on that blank form.

MR. BEECHER: Judge, returning to the wording on my instruction, the statement is a statement: Penalty is a form of punishment. I would ask that it be changed to read that: A penalty can be a form of punishment.

THE COURT: Do you wish to—I think this is in keeping with the Court's verbal comments to the jury as they went out. In other words, we don't really quite understand or know.

MR. ENGLUND: Your Honor, we request that [4343] the language stays as it is, because I think that that's why we're here talking. A penalty is a form of punishment and, again, I think--

THE COURT: Ask Gary to call me, please.

MR. ENGLUND: —I think to try and say otherwise —again, we're again in this area where the instruction as we have it is discussing "penalty" as it is defined in the dictionary. A penalty is a punishment, and, therefore, that's the justification for our requesting an instruction to that effect.

THE COURT: I have an instruction here that reads as follows: "A penalty is a punishment and is a form of punitive damages. It may not be imposed as any part of your verdict."

I am going to send in this instruction, and the reason I am sending it in is this is the legal meaning we give "penalty." They may have thought it was something else, and that's what I told them, they may not, but there is the meaning the Court gives it and they must know that they may not do this.

MR. BEECHER: Could we add the legal definition of what "penalty" is?

THE COURT: Well, all the instructions are the legal definition.

MR. BEECHER: All right.

[4344] THE COURT: A new verdict form and send this in, please.

MR. ENGLUND: Your Honor, could we just read the language before it goes in, please.

THE COURT: Anything further?

MR. BEECHER: So that the record shows, we would respectfully take formal exception to that instruction. It's more out of a lack of confidence growing out of inability to mull this over. The Court can't wait, I appreciate that, but we do—

THE COURT: Well, I could wait. The question is the jurors will rely on only the instructions that they have, plus the verbal instruction the Court gave.

MR. MORIARTY: We're very concerned that that's tantamount to a directed verdict to subtract that, and I don't think the Court means to do that.

THE COURT: The Court only intends to make sure that the jurors follow the Court's instructions.

MR. ENGLUND: Your Honor, that may bring up a good point, and what I would do in this context is we would move for a directed verdict instruction that the penalty should be deducted, the amount of penalty should be deducted from their award.

THE COURT: Well, I am not reading into [4345] the jurors' minds. I do not know what is in the jurors' minds, and they may think everything—they may not be looking at the word "penalty" like you look at the word "penalty." I don't know, and I'm not going to in any way inquire into the jury at this point.

MR. KING: I guess our point, your Honor, is that on final reflection in this difficult circumstance, and as one mulls this over, one comes to one's final position, but I think our final position is that we've already articulated our point about mistrial.

In the alternative we would propose that the jury be instructed that any—that the jury be instructed using the instruction as proposed, and add the phrase: You are instructed that any penalty be deducted—the penalty awarded in your verdict must be subtracted from your award. That would be the clause that we would propose today.

MR. ENGLUND: I think as a separate instruction, your Honor, I would propose: The penalty awarded in your verdict must be subtracted from your award.

THE COURT: The Court will not do that because the Court does not know what the jurors—in fact, had they not written that in, this would never have come up. [4346] MR. KING: Quite true, but they did.

THE COURT: But they did, and so we have to deal with it and I'm not going to read something into that verdict form that is not there. Ordinarily we have just an amount and we never read into it, no matter what the jurors think. That is their privacy, their decision. They have now done this; we have to deal with it. I am not going to tell the jurors what they are to do, only what they can and cannot consider, period.

MR. ENGLUND: For our record, can we—Mr. Moriarty.

MR. MORIARTY: Perhaps this problem might be cured—or plaintiff's problems with this instruction as given might be cured if you would add the preparatory statement that the Court—by this instruction, the Court does not mean to comment on the presence or absence of any intent in your verdict, but—and then go into the instruction about the word "penalty."

I'm just concerned that that instruction is directing the jury to subtract it, and I don't think you mean to do that. Because when you gave the oral instruction to the jury, it was carefully stated that, you know, you weren't saying—attempting to say whether they did or did not mean to inflict punitive [4347] damages, but I think by that instruction, you're clearly telling them that's what they did and they've got to deduct it.

So plaintiffs are concerned that the jury is going to read some intent that you may be giving them.

THE COURT: Anything further?

MR. ENGLUND: We would object to including any explanatory language like that, your Honor. We believe that that would then water down the entire meaning of

giving an instruction. I believe your own introductory instruction that's already given to them indicates that they are to determine the case in the context of the facts and the instructions that have been given to them. We believe the instruction should not include any explanatory or introductory language.

MR. MORIARTY: By giving this instruction: The Court is not intending to infer what your meaning was in placing the language you did on the jury form. However, you are instructed that. . . . At least that's a neutral sort of instruction, your Honor.

MR. ENGLUND: We're not dealing with a neutral situation at this point. We're talking about the jury has been advised that they've had some failure or apparent failure to satisfactorily follow those [4348] instructions. You are giving them another instruction based on law, and as such, they are to follow the instructions. They do not need an explanation beyond that, I don't believe.

MR. KING: And more over, it again suggests that they're not employing the term "penalty" given it's ordinary english language meaning, which would be far outside of the Court—

THE COURT: This is my suggestion, that this instruction should read: By this instruction, the Court does not intend to tell what you the verdict should be. However penalty is . . .

MR. MORIARTY: I think that addresses the problem, the concern we had, your Honor.

MR. KING: Your Honor, I think that underscores why, given additional opportunity to reflect, EAC proposed the instruction Mr. Englund read a short moment ago, which I would reiterate: The penalty awarded in your verdict must be subtracted from your award.

THE COURT: That is telling the jury what they should do as far as the amount, and the Court will not do that. I take no position on the amount. And if you had a mistrial, it's possible you could come [4349] back and a new jury might find 44 million. I don't know.

A jury might find zero. I don't know what it would be, but I do think that this jury has spent a long time. If they are misled, we are reading something into their verdict that is not there.

Would you add this to it. This will be the first sentence.

MR. ENGLUND: Your Honor, just while Mr. Boe is doing that, to complete our record, I will give the bailiff our handwritten language, the language that both Mr. King and I have read, and we'll formally take exception to not giving that.

THE COURT: That will be part of the record.

MR. ENGLUND: And also we would take exception to the instruction that is now being prepared to go into the jury room. In terms of the—

THE COURT: I just wanted to make sure that when this goes for appeal, the appellate court has an opportunity to know that they have been instructed, and that the appellate court will make a decision whether this is to be set aside or not. I do not take that responsibility. I do not jump to the conclusion that the jurors meant what you think the jurors meant.

MR. ENGLUND: Did you come to a [4350] conclusion, your Honor, on whether or not the former verdict form is going in to the—

THE COURT: No, it is not.

MR. ENGLUND: We would register our exception to that, your Honor.

THE COURT: I thought you were objecting that it was going in.

MR. ENGLUND: No. We indicated, your Honor, we believed it would be appropriate for it to go in.

THE COURT: Would you state your reason? I don't want to just overrule you without knowing what your reason is. I want to make sure that you're just not objecting because the other side has asked and they want it to go in.

MR. KING: No, we're not, your Honor. I think our reason is that we do have the extraordinary circumstance here where a jury has not only told us a general amount, but they have gone through an elaborate calculation, determining a figure they regard as past loss, adding an additional amount for three years at 1987 rate, and then adding an amount for three years penalty for fraud.

And it's our position that the plain reading of this, the only reasonable reading of this is that this verdict appears to represent a determination of $13,447,000 for compensation and $6,498,000 for, quote, penalty, unquote, and that not to give them their prior verdict actually invites them to come to a new figure on a new calculation, however recharacterized, which will coincide with the, quote, fair, unquote, amount that was previously handed down, as they described to the bailiff, and as the bailiff generally affirmed.

MR. ENGLUND: I think, furthermore, the verdict form has the specific language that we're concerned about, that the jury should have that in front of them.

THE COURT: Thank you. Anything further on this issue?

MR. BEECHER: No.

THE COURT: The Court will allow the jurors to look at their verdict form, to reconsider it.

(Pause in the proceedings.).

THE COURT: The instruction reads as follows: "By this instruction, the Court does not intend to tell you what the verdict should be. A penalty is a punishment and is a form of punitive damages and may not be imposed as any part of your verdict."

[4352] That is clear that punitive damages are not awarded in the state of Washington. I have already told them to read their instructions again and to base their decision on the instructions. I feel that this is all I will

do at this time. I will leave it for far greater minds than mine to decide what to do.

MR. MORIARTY: Your Honor, we appreciate the changes you made, and feel it's a much better instruction, but for the record we do have to except.

THE COURT: I understand.

MR. KING: For the record we do have to except.

THE COURT: Are there any other objections to the verdict form? If there are no other objections to the verdict form, it is going back in.

MR. KING: Your Honor, we would ask that the jury be brought out and have this instruction read to them and presented to them in that form.

THE COURT: There are no other objections that have not been stated? I want them now or they are forever lost.

MR. KING: Oh, well, when you put it in that form, just to reiterate, we are—we continue to move for a mistrial. We're not—

THE COURT: But based on the penalty—

[4353] MR. KING: Well, not solely based on the penalty question.

THE COURT: Because if the Court—

MR. KING: Based on the comment to the jury, we don't think prejudice can be undone.

THE COURT: But if the Court can correct anything, I want to make sure that there is nothing else that you objected to. Just take that to the jurors.

MR. KING: Your Honor, we would formally except to the—

THE COURT: Any objection to having the jurors come in to have the instruction read?

MR. BEECHER: I guess I don't have an objection but I don't see how it could possibly—it's a meaningless gesture, I think.

THE COURT: Is there a special reason that you wish to have it—

MR. KING: Yes, Your Honor. I think that instructions given to the jury as they have always received instructions from the bench, read to them, is going to have more significance to them than if it is just a piece of paper handed to them in the jury room.

THE COURT: Any objection to excusing the jury before six o'clock?

MR. KING: No, your Honor.

[4354] MR. BEECHER: No, your Honor.

(Jury in.)

THE COURT: I know you are all very tired, and I will be letting you go home. Sorry this has to be done but it's very important that you have an instruction that is a written instruction other than my oral instruction. This is the instruction that states as follows:

"By this instruction, the Court does not intend to tell you what the verdict should be. A penalty is a punishment and is a form of punitive damages and may not be imposed as any part of your verdict."

With this comes a clean verdict form for you to fill in, and have the foreman sign. You may consider, of course, this instruction, to be taken in addition to the other instructions. So, all the instructions have meaning, they must all be considered. Follow all the instructions, including this new instruction. I have not given it a number. I believe it probably would be 16 if I were to number it. It has no number, but it is to be considered in addition to and with all the other instructions. Thank you.

(Jury out.)

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